FOR ARGUMENT

Supreme Court, U. S.
FILED
MAR 22 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF CUSTOMS AND PATENT APPEALS

PETITION FOR CERTIORARI FILED OCTOBER 11, 1977
CERTIORARI GRANTED FEBRUARY 21, 1978

INDEX

	Page
Relevant Docket Entries [United States Customs Court]	1
Relevant Docket Entries [United States Court of Customs and Patent Appeals]	4
Summons	6
Complaint [with exhibits]	8
Defendant's Answer	30
Plaintiff's Motion for Summary Judgment	33
Plaintiff's Statement Pursuant to Rule 8.2(b)	34
[Plaintiff's Proposed] Order and Judgment	38
Defendant's Cross-Motion for Summary Judgment	40
Defendant's Statement of Material Facts	41
[Defendant's Proposed] Order	43
Exhibit A to Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment	44
Exhibit C to Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment	49
Plaintiff's Exhibit 2 to Plaintiff's Reply Brief and Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment	52

Page

Plaintiff's Exhibit 4 to Plaintiff's Reply Brief and Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment 78

Plaintiff's Exhibit 5 to Plaintiff's Reply Brief and Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment 93

Plaintiff's Exhibit 6 to Plaintiff's Reply Brief and Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment 117

Plaintiff's Exhibit 7 to Plaintiff's Reply to Defendant's Supplemental Memorandum [without exhibits] 139

Notice of Appeal 152

Order Allowing Certiorari 155

NOTES:

The Opinion of the United States Customs Court and Concurring Opinions are printed at 430 F.Supp. 242 and are found in Appendix A to the petition for certiorari, pages 1a-50a.

The Order [and Judgment] of the United States Customs Court is found in Appendix B to the petition for certiorari, pages 53a-54a.

The Opinion of the United States Court of Customs and Patent Appeals and Dissenting Opinion are printed at 562 F.2d 1209 and are found in Appendix C to the petition for certiorari, pages 57a-112a.

Relevant Docket Entries

UNITED STATES CUSTOM COURT

Court No. 76-3-00637

ZENITH RADIO CORP.

v.

UNITED STATES

Date (Filing/Entry)—Proceedings

April 12/76—Complaint filed.

June 10/76—Answer to complaint filed.

June 23/76—Pltf filed motion for Summary Judgment.

June 25/76—Action asgd. to Hon. Herbert N. Maletz, Judge.

July 19/76—Deft filed motion to extend time to Aug. 24/76 to respond to Summary Judgment.

July 29/76—Defts motion to extend time to Aug. 24/76 to respond to Summary Judgment. GRANTED.

Aug 2/76—Deft filed motion for a Three Judge Panel.

Aug 16/76—Pltf refers to the descretion [*sic*] of the court in regard to defts motion for a Three Judge panel.

Aug 24/76—Defendant filed opposition to plaintiff's motion for Summary Judgment and cross motions for a Summary Judgment.

Sept. 10/76—Pltf. filed its reply brief and memorandum in opposition to defts. cross-motion for Summary Judgment.

Date (Filing/Entry)—Proceedings

Sept. 16/76—Defts. motion for a Three Judge Panel Granted. Case reassigned to Chief Judge Boe; Judge Newman and Judge Richardson.

Sept. 22/76—Deft filed motion to extend time to Oct 4/76 to reply to pltfs memo in opposition to defts cross motion for summary judgment.

Oct. 1/76—Pltf. did not respond to defts. motion filed Sept. 22/76. Deft. filed its reply brief to pltfs. memorandum in opposition to defts. cross-motion for summary judgment.

Oct. 6/76—Defts. motion for an order extending defts. time for replying to pltfs. memo. in opposition to defts. cross-motion for summary judgment until Oct. 4/76, granted.

Oct. 6/76—Oral Argument in connection w/the respective Motions for Summary Judgment pending in the instant action, ordered for Tuesday, Nov. 9/76, at 10:00 A. M. in Courtroom No 1 of the U. S. Customs Court, New York, N. Y.

Oct. 26/76—Deft filed motion for leave to file a supplemental memorandum.

Nov. 5/76—Pltf noted opposition to defts motion to file supplemental memorandum.

Nov. 5/76—Deft filed motion for leave to file the English translation of the German Sugar Tax Law of 1896.

Nov. 5/76—Deft's motion for leave to file a supplemental memorandum DENIED. Subject. However, to any subsequent determination by the court requesting such additional memoranda to be submitted.

Date (Filing/Entry)—Proceedings

Nov. 9/76—Deft filed supplemental memorandum, as directed by the court during the oral argument held this day, and pltf. is granted 15 days from this date to file a supplemental memorandum.

Nov. 9/76—Defts. motion for leave to file the English translation of the German Sugar Law of 1896 granted, in as much as deft. is to file within 10 days from this date either a joint translation agreed to by pltf. or seperate [*sic*] translations are to be filed by both pltf. & deft.

Nov. 12/76—Deft filed translation of the German Sugar Tax Law of 1896.

Nov. 15/76—Pltf filed response to Deft's translation of the German Sugar Tax Law of 1896 indicating that it found no material errors in the translation.

Nov. 19/76—Plaintiff filed reply to defendant's supplemental memorandum.

Apr. 12/77—Pltfs. motion for summary judgment, granted. Defts. cross-motion for summary judgment, denied. C.D. 4691.

Relevant Docket Entries

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

No. 77-19

THE UNITED STATES, *Appellant*

v.

ZENITH RADIO CORPORATION, *Appellee*

Date—Proceedings and Orders

ASSISTANT ATTORNEY GENERAL

April 15, 1977—Counsel for appellee: Eugene Stewart and Frederick Ikenson, Philip J. Curtis. Motion of appellant to expedite proceedings, filing times as follows: *Printed transcript* to be filed 30 days after receipt of original record from Customs Court. *Appellant's brief* to be filed simultaneously with printed transcript; *Appellee's brief* to be filed 30 days after service of appellant's brief; *Reply of appellant* to be filed 5 days after service of appellee's brief, filed.

April 18, 1977—No objection to above motion by appellee, filed.

April 21, 1977—Above motion to expedite, granted as follows: Transcript & appellant's brief due May 12, 1977. Appellee's brief due June 1, 1977. Appellant's reply brief due June 6, 1977. Hearing set for June 8, 1977 at 10:00 a.m. See Order re extension and form of papers in file.

April 25, 1977—Record received. (card sent)

May 5, 1977—Motion of American Importers Assn., Inc. to file brief amicus curiae in support of Appellant, filed.

May 6, 1977—Opposition to above motion by appellee, filed.

Date—Proceedings and Orders

May 6, 1977—Above motion of AIA granted, brief to be filed on or before May 12, 1977 (appellee may file reply on or before June 7, 1977).

May 12, 1977—PRINTED RECORD FILED.

May 12, 1977—BRIEF FOR APPELLANT FILED.

May 12, 1977—BRIEF FOR AMICAS [*sic*] CURIAE, filed.

May 23, 1977—Motion by appellee to file brief in excess of fifty pages, not to exceed 10 pages over the limitation, filed.

May 23, 1977—Above motion granted.

June 1, 1977—BRIEF FOR APPELLEE, filed.

June 6, 1977—REPLY BRIEF FOR APPELLANT, filed.

June 8, 1977—Argued

July 28, 1977—Reversed and remanded for entry of an order granting the motion for summary judgment of the United States. Markey, Chief Judge. Dissenting opinion by Judge Miller with whom Judge Baldwin joins.

Aug. 15, 1977—Motion of appellant to stay mandate to September 14, 1977, filed.

August 16, 1977—Above motion granted.

Sept. 8, 1977—Motion of appellee to extend time for issuing the mandate to October 14, 1977, filed.

Sept. 8, 1977—Above motion granted.

Oct. 11, 1977—Petition for Writ of Certiorari filed in Supreme Court of the United States; No. 77-539.

Feb. 21, 1978—Petition for Writ of Certiorari granted.

UNITED STATES CUSTOMS COURT

Summons 76-3-00637

ZENITH RADIO CORPORATION, *Plaintiff*,

v.

UNITED STATES, *Defendant*.

To: The Attorney General and the Secretary of the Treasury:

PLEASE TAKE NOTICE that a civil action has been commenced to contest a determination by the Secretary of the Treasury made pursuant to section 516(d) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(d), as amended).

/s/ JOSEPH E. LOMBARDI
Clerk of the Court

Plaintiff is an American manufacturer of certain consumer electronic products, including television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, and parts of television receivers, such as color television picture tubes, resistors, transformers (deflection components), and tuners for receivers with integrated circuits.

1. _____

(Status of plaintiff)

The contested decision is the Secretary of the Treasury's determination that no bounty or grant is being paid or bestowed within the meaning of 19 U.S.C. § 1303 upon the manufacture, production or exportation of certain consumer electronic products from Japan.

2. _____

(Brief description of contested determination by the Secretary of the Treasury)

3. January 7, 1976

(Date of the determination by the Secretary)

4. January 28, 1976

(Date of filing with the Secretary of the plaintiff's written notice of desire to contest such determination)

5. March 10, 1976

(Date of publication by Secretary of notice of desire to contest such determination)

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Attorneys for Plaintiff

6. _____

(Name, signature, post office address, and telephone number of attorney filing summons or the individual filing summons in his own behalf)

[FILED: MARCH 11, 1976]

UNITED STATES CUSTOMS COURT

[CAPTION OMITTED IN PRINTING]

Complaint

Plaintiff, Zenith Radio Corporation, by and through its counsel, alleges herein as follows:

1. Plaintiff brings this action pursuant to 19 U.S.C. § 1516(d), as amended by section 321(f)(1) of the Trade Act of 1974, Public Law 93-618.

2. Plaintiff is a corporation organized under the laws of the State of Delaware, with its principal offices in Chicago, Illinois.

3. Plaintiff is a domestic manufacturer of various consumer electronic products, including the following: television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs, complete with amplifiers and speakers, tape recorders, and color television picture tubes.

4. On April 3, 1970, plaintiff filed with the Commissioner of Customs a petition under 19 U.S.C. § 1303 and 19 C.F.R. § 16.24(b), in which it was alleged that bounties or grants were being paid or bestowed, directly or indirectly, upon the manufacture or production of certain consumer electronic products in Japan, or upon the exportation of certain consumer electronic products from Japan. On February 14, 1972, plaintiff filed with the Commissioner of Customs a supplement to its aforesaid petition.

5. On March 20, 1972, the Magnavox Company (hereinafter "Magnavox") filed with the Acting Commissioner of Customs a petition under 19 U.S.C. § 1303 in which it was alleged that bounties or grants were being paid or bestowed, directly or indirectly, upon the manufacture or

production of certain consumer electronic products in Japan, or upon the exportation of certain consumer electronic products from Japan. On April 19, 1972, Magnavox filed with the Acting Commissioner of Customs a supplement to its aforesaid petition.

6. Included among the bounties or grants which plaintiff and Magnavox described in their submissions, discussed in ¶¶ 4 and 5, *supra*, as being paid or bestowed on the exportation of certain consumer electronic products from Japan was the exemption of export shipments from a so-called "commodity tax," or the refund of such tax upon exportation, when previously paid.

7. On May 19, 1972, a "Notice of Countervailing Duty Proceedings," in the case of "Certain Electronic Products from Japan," issued by the Acting Commissioner of Customs and approved by the Assistant Secretary of the Treasury, was published in the Federal Register. 37 Fed. Reg. 10087. In this Notice, it was announced that information had been received which raised a question as to whether certain payments, bestowals, rebates, or refunds granted by the Government of Japan upon the manufacture, production, or exportation of certain consumer electronic products constitute the payment or bestowal of a bounty or grant within the meaning of 19 U.S.C. § 1303. A list of the products involved was provided in an Appendix A. A true and accurate copy of the aforementioned page of the Federal Register, containing the above-described Notice, is annexed hereto as Exhibit A and made a part hereof.

8. On June 8, 1972, a "Notice of Countervailing Duty Proceedings," in the case of "Certain Electronic Products from Japan," issued by the Acting Commissioner of Customs and approved by the Assistant Secretary of the Treasury was published in the Federal Register. 37 Fed. Reg. 11487. This Notice amended the Notice described in ¶ 7 by extending the list of products in Appendix A thereof. A true and accurate copy of the aforementioned page of the

Federal Register is annexed hereto as Exhibit B and made a part hereof.

9. On February 5, 1975, a "Notice of Preliminary Determination," in the case of "Certain Consumer Electronic Products from Japan," issued by the Commissioner of Customs and approved by the Assistant Secretary of the Treasury, was published in the Federal Register. 40 Fed. Reg. 5378. Although several of the alleged bounties or grants bestowed by Japan upon the manufacture, production or exportation of certain consumer electronic products were discussed in this Notice, no mention was made of the exemption or rebate of commodity tax, referred to in ¶ 6, *supra*. The Commissioner of Customs stated in the Notice that, before a final determination would be made, consideration would be given to any relevant data, views, or arguments submitted in writing with respect to the preliminary determination. A true and accurate copy of the aforementioned page of the Federal Register is annexed hereto as Exhibit C and made a part hereof.

10. On March 3, 1975, plaintiff submitted its comments to the Commissioner of Customs, pursuant to the Notice described in ¶ 9, *supra*, and advised that the Preliminary Determination of February 5, 1975, did not deal with various alleged bounties or grants, including the Japanese commodity tax exemption for or refund on exports.

11. On May 7, 1975, a Notice entitled "Preliminary Countervailing Duty Determination; Bounties and Grants," in the case of "Certain Consumer Electronics Products from Japan," issued by the Commissioner of Customs and approved by the Acting Assistant Secretary of the Treasury, was published in the Federal Register. 40 Fed. Reg. 19853. In this Notice, the following was stated:

> "A question has been raised concerning Treasury's determination with respect to other alleged bounties or grants paid or bestowed on this merchandise. To clarify the matter, the notice of February 5 is hereby amended by inserting a new paragraph, following the fourth paragraph, as follows:
>
> 'Any other programs alleged to result in the payment or bestowal of a bounty or grant within the meaning of section 303 of the Act have been terminated by the Japanese Government and/or are preliminarily determined not to result in the payment or bestowal of a bounty or grant'."

A true and accurate copy of the aforementioned page of the Federal Register is annexed hereto as Exhibit D and made a part hereof.

12. On January 7, 1976, a "Final Negative Countervailing Duty Determination," in the case of "Certain Consumer Electronic Products from Japan," issued by the Acting Commissioner of Customs and approved by the Acting Assistant Secretary of the Treasury, was published in the Federal Register. 41 Fed. Reg. 1298. This Determination stated that "a final determination is hereby made in this proceeding, that . . . no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), upon the manufacturer [*sic*], production, or exportation of certain consumer electronic products from Japan." A true and accurate copy of the aforementioned page of the Federal Register is annexed hereto as Exhibit E and made a part hereof.

13. On January 28, 1976, plaintiff, through counsel, served a Notice upon the Office of the Secretary of the Treasury, pursuant to 19 U.S.C. § 1516(d), as amended, advising of plaintiff's desire to contest the negative determination referred to in ¶ 12, *supra*, before the Customs Court, and requesting that publication of this Notice be made forthwith, as required by said 19 U.S.C. § 1516(d), as amended.

A true and accurate copy of plaintiff's Notice is annexed hereto as Exhibit F and made a part hereof.

14. On March 10, 1976, a Notice, entitled, "Assessment of Countervailing Duties on Certain Consumer Electronic Products from Japan," issued by the Acting Commissioner of Customs and approved by the Acting Assistant Secretary of the Treasury, was published in the Federal Register. 41 Fed. Reg. 10235. The Acting Commissioner of Customs announced in this Notice that notification had been received from the plaintiff that it desired to contest the negative countervailing duty determination, referred to in ¶ 12, *supra*. A true and accurate copy of the aforementioned page of the Federal Register is annexed hereto as Exhibit G and made a part hereof.

15. On March 11, 1976, the summons in this action was filed with the Customs Court on behalf of plaintiff.

16. Of the consumer electronic products which were the subject of the "Final Negative Countervailing Duty Determination," described in ¶ 12, *supra*, plaintiff wishes to contest the aforesaid negative determination with respect to the following products: television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs, complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes (hereinafter "subject electronic products"). Plaintiff is an American manufacturer of merchandise of the same class or kind as the subject electronic products.

17. The Commodity Tax Law of Japan, among other things, provides for the following: a tax, known as a commodity tax, is levied on the shipment of certain kinds of commodities, including all the subject electronic products. The tax base of the commodity tax levied on the shipment of the subject electronic products, manufactured in Japan,

is the manufacturer's sales price. The tax rates at which the commodity tax is levied on the shipment of the aforementioned products are as follows:

Television Receivers—	
Large television receivers (ones using a picture tube of which the maximum field diameter exceeds 69 centimeters)	20%
Small television receivers (ones using a picture tube of which the maximum field diameter is 69 centimeters or less)	15%
Color Television Picture Tubes	
Having a maximum field diameter which exceeds 69 centimeters	20%
Having a maximum field diameter of 69 centimeters or less	15%
Radio Receivers	
Stereophonic (other than ones housed in metal cases of width or height of 90 centimeters or more)	15%
Other than stereophonic (other than ones housed in metal cases of width or height of 90 centimeters or more)	10%
Housed in metal cases of width or height of 90 centimeters or more	5%
Radio-phonograph Combinations	15%
Radio-television-phonograph combinations	
If television qualifies for 20% rate	20%
If television qualifies for 15% rate	15%

Record players and phonographs complete with amplifiers and speakers	15%
Tape players, tape recorders, and radio/tape recorder combinations	
Stereophonic	15%
Other than stereophonic	10%

No commodity tax applies to the shipment of the subject electronic products when the articles are exported. When a commodity tax has been paid in relation to the shipment of a product, and that product is subsequently exported, the exporter is entitled to receive a refund of such tax.

18. Under the Commodity Tax Law of Japan, when the subject electronic products are shipped for export from Japan, they are exempt from payment of any commodity tax. The same articles, when shipped from the manufacturer's factory for consumption in Japan, are subject to such a tax. Also, under the Commodity Tax Law of Japan, when a commodity tax is paid on the shipment of an article which is later exported, the exporter receives a refund of such tax.

19. The exemption or refund of the commodity tax on the exportation from Japan of the subject electronic products constitutes the conferral of an economic benefit upon the manufacture and exportation of the aforesaid products.

20. The exemption or refund of the commodity tax on the exportation from Japan of the subject electronic products constitutes the payment or bestowal of a bounty or grant within the ambit of 19 U.S.C. § 1303.

21. The Secretary of the Treasury has the duty to order the assessment of countervailing duties on the imported subject electronic products in the amount of the commodity taxes which would have been collected by the Japanese Government had such products been sold for home consumption in Japan.

WHEREFORE, it is respectfully prayed that this Honorable Court (1) determine that the Government of Japan is paying or bestowing a bounty or grant on the exportation of the subject electronic products by reason of its exempting such products from taxes which otherwise would have been levied on their shipment from the manufacturer's factory for consumption in Japan, (2) direct the Secretary of the Treasury to order the assessment of countervailing duties on imports of the aforementioned products from Japan in amounts equal to the net bounties or grants as described herein, and (3) provide any other relief which this Honorable Court deems just and proper.

Respectfully submitted,

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Attorneys for Plaintiff

April 9, 1975 [*sic*]

[FILED: APRIL 12, 1976]

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

[Exhibit A to Complaint]

DEPARTMENT OF THE TREASURY

BUREAU OF CUSTOMS

CERTAIN ELECTRONIC PRODUCTS FROM JAPAN

Notice of Countervailing Duty Proceedings

Information has been received pursuant to the provisions of § 16.24(b) of the Customs Regulations (19 CFR 16.24 (b)) which raises a question as to whether certain payments, bestowals, rebates, or refunds granted by the Government of Japan upon the manufacture, production, or exportation of certain consumer electronic products constitute the payment or bestowal of a bounty or grant, directly or indirectly, within the meaning of section 303 of the Tariff Act of 1930 (19 U.S.C. 1303), upon the manufacture, production, or exportation of the merchandise to which the payments, bestowals, rebates or refunds apply. A list of these products is provided in Appendix A below.

The approximate amount of the payments, bestowals, rebates, or refunds applicable to certain consumer electronic products from Japan has not yet been ascertained.

After the expiration of the time limits set forth in this notice, a determination will be made whether a bounty or grant is being paid or bestowed in connection with any such manufacture, production, or export. If it is determined that a bounty or grant is being paid or bestowed, an appropriate countervailing duty order will be issued and published in accordance with § 16.24 of the Customs Regulations (19 CFR 16.24).

Before a determination is made, consideration will be given to any relevant data, views, or arguments submitted in writing with respect to the existence or nonexistence, and the net amount of a bounty or grant. Submissions should be addressed to the Commissioner of Customs, 2100 K

Street NW., Washington, D.C. 20226, in time to be received by his office not later than 30 days from the date of publication of this notice in the FEDERAL REGISTER.

This notice is published pursuant to § 16.24(d) of the Customs Regulations (19 CFR 16.24(d)).

[SEAL] LEONARD LEHMAN,
Acting Commissioner of Customs.

Approved: May 17, 1972.

EUGENE T. ROSSIDES,
Assistant Secretary of the Treasury.

APPENDIX A

Television Receivers.

Radio Receivers.

Radio-Phonograph Combinations.

Radio-Television-Phonograph Combinations.

Radio/Tape Recorder Combinations.

Tape Players.

Record Players and Phonographs complete with amplifiers and speakers.

Tape recorders.

[F.R. Doc. 72-7714 Filed 5-18-72; 9:41 a.m.]

[Irrelevant Notices Omitted in Printing]

Federal Register, Vol. 37, No. 98—Friday, May 19, 1972
[Page 10087]

[Exhibit B to Complaint]

DEPARTMENT OF THE TREASURY

BUREAU OF CUSTOMS

• • • • •

CERTAIN ELECTRONIC PRODUCTS FROM JAPAN

Notice of Countervailing Duty Proceedings

The "Notice of Countervailing Duty Proceedings" with respect to certain electronic products from Japan published in the FEDERAL REGISTER of May 19, 1972 (37 F.R. 10087, F.R. Doc. 72-7714), is amended by inserting the following: "Parts of television receivers: Color television picture tubes, resistors, transformers (deflection components), and tuners for receivers with integrated circuits," after the words "Television Receivers." in Appendix A of the notice. The notice is also amended by extending the time period for the receipt of relevant data, views, or arguments with respect to the existence or nonexistence, and the net amount of a bounty or grant, from 30 days to 60 days from the date of publication of the above-cited notice in the FEDERAL REGISTER.

[SEAL] EDWIN F. RAINS,
Acting Commissioner of Customs.

Approved: June 5, 1972.

EUGENE T. ROSSIDES,
Assistant Secretary of the Treasury.

[F.R. Doc. 72-8689 Filed 6-6-72; 10:01 am]

[Irrelevant Notices Omitted in Printing]

Federal Register, Vol. 37, No. 111—Thursday, June 8, 1972
[Page 11487]

[Exhibit C to Complaint]

DEPARTMENT OF THE TREASURY

CUSTOMS SERVICE

CERTAIN CONSUMER ELECTRONICS PRODUCTS FROM JAPAN

Notice of Preliminary Determination

In the FEDERAL REGISTER of May 19, 1972 (37 FR 10087), there was published a "notice of countervailing duty proceedings" in which the Commissioner of Customs announced that information had been received pursuant to the provisions of § 16.24(b) of the Customs Regulations (currently 19 CFR 159.47(b), Customs Regulations) which raised a question as to whether certain payments, bestowals, rebates, or refunds granted by the Government of Japan upon the manufacture, production, or exportation of certain consumer electronic products constituted the payment or bestowal of a bounty or grant, directly or indirectly, within the meaning of section 303 of the Tariff Act of 1930 (19 U.S.C. 1303) (referred to in this notice as "the Act"), upon the manufacture, production, or exportation of the merchandise to which the payments, bestowals, rebates or refunds applied. This notice was amended by a second notice which was published in the FEDERAL REGISTER of June 8, 1972 (37 FR 11487). The notices enumerated specific consumer electronic products under consideration which are set forth in Appendix A below. In accordance with the provisions of the second notice dated June 8, a time period of 60 days was provided from the date of the original notice for the receipt of relevant data, views, or arguments with respect to the existence or nonexistence, and the net amount, of any bounty or grant within the meaning of section 303 of the Act.

On the basis of an investigation conducted pursuant to § 159.47(c), Customs Regulations (19 CFR 159.47(c)), it has been determined that benefits have been received under

three programs which constitute bounties or grants within the meaning of section 303 of the Act. These programs include preferential interest rate loans from the Japanese Development Bank, promotional assistance from the Japan External Trade Organization (JETRO), and tax deferrals under the Overseas Market Development Reserve.

In the first two programs, the benefits bestowed on exporters involve an amount considered to be *de minimis*. In the case of the Overseas Market Development Program, the aggregate data available indicates that the pro rated benefits to exporters of the consumer electronic products in question are also *de minimis*, and that, when considered in this light in the aggregate, all three programs combined are also considered *de minimis*. Since the Overseas Market Development Program is available only to firms which are capitalized at less than one billion yen, however, significant benefits could conceivably be concentrated in a few smaller firms exporting these products to the United States. In order to ensure that significant bounties or grants are not being paid or bestowed under this program, the Commissioner of Customs will require reports from Japanese firms eligible for tax deferrals under the Overseas Market Development Program and exporting the consumer electronic products in question to the United States to ascertain whether and to what extent, they benefit from the program.

If it is determined that no Japanese firm benefits from the Overseas Market Development Program in an amount more than *de minimis* in relation to the quantity of exports involved a final negative determination will be issued. If it is determined that any Japanese firms do benefit from this program by an amount that is more than *de minimis* in relation to the quantity of exports involved an affirmative determination will be issued as to such firms, and, additionally, suspension of liquidation will be ordered as to entries of the subject merchandise manufactured or exported by any firm which is eligible for benefits under the program but has not submitted the required report. Such

suspension of liquidation would remain in effect until the report was received and a determination made as to whether a bounty or grant were being paid or bestowed.

Before a final determination is made, consideration will be given to any relevant data, views or arguments, in addition to the required reports described above, submitted in writing with respect to the preliminary determination. Submissions should be addressed to the Commissioner of Customs, 2100 K Street, NW., Washington, D.C. 20229, in time to be received by his office on or before March 7, 1975. This preliminary determination is published pursuant to section 303(a) of the Tariff Act of 1930 (19 U.S.C. 1303(a)).

VERNON D. ACREE,
Commissioner of Customs.

Approved: January 30, 1975.

DAVID R. MACDONALD,
Assistant Secretary of the Treasury.

APPENDIX A

Televisions receivers.

Parts of television receivers: Color television picture tubes, resistors, transformers (deflection components), and tuners for receivers with integrated circuits.

Radio receivers.

Radio—Phonograph combinations.

Radio—Television-Phonograph combinations.

Radio/tape recorder combinations.

Tape players.

Record players and phonographs complete with amplifiers and speakers.

Tape recorders.

[F.R. Doc. 75-3160 Filed 2-4-75; 8:45 am]

[Irrelevant Notices Omitted in Printing]

Federal Register, Vol. 40, No. 25—Wednesday, February 5, 1975 [Page 5378]

[Exhibit D to Complaint]

DEPARTMENT OF THE TREASURY

CUSTOMS SERVICE

CERTAIN CONSUMER ELECTRONICS PRODUCTS FROM JAPAN

Preliminary Countervailing Duty
Determination; Bounties and Grants

A "Notice of Preliminary Determination" was published in the FEDERAL REGISTER of February 5, 1975 (40 FR 5378, FR Doc. 75-3160) announcing that a preliminary determination had been made that benefits have been paid or bestowed on certain consumer electronic products from Japan under three programs which constitute bounties or grants within the meaning of section 303 of the Tariff Act of 1930 (19 U.S.C. 1303).

A question has been raised concerning Treasury's determination with respect to other alleged bounties or grants paid or bestowed on this merchandise. To clarify the matter, the notice of February 5 is hereby amended by inserting a new paragraph, following the fourth paragraph, as follows:

Any other programs alleged to result in the payment or bestowal of a bounty or grant within the meaning of section 303 of the Act have been terminated by the Japanese Government and/or are preliminarily determined not to result in the payment or bestowal of a bounty or grant.

Any relevant data, views, or arguments respecting this amendment should be submitted in writing to the Commissioner of Customs, 2100 K Street, NW., Washington, D.C. 20229, in time to be received by his office on or before May 30, 1975.

VERNON D. ACREE,
Commissioner of Customs.

Approved: May 2, 1975.

JAMES B. CLAWSON,
Acting Assistant Secretary of the Treasury.

[FR Doc. 75-11988 Filed 5-6-75; 8:45 am]

[Irrelevant Notices Omitted in Printing]

Federal Register, Vol. 40, No. 89—Wednesday, May 7, 1975
[Page 19853]

[Exhibit E to Complaint]

DEPARTMENT OF THE TREASURY

• • • • •

CUSTOMS SERVICE

CERTAIN CONSUMER ELECTRONIC PRODUCTS FROM JAPAN

Final Negative Countervailing Duty Determination

On February 5, 1975, a "Notice of Preliminary Determination" was published in the FEDERAL REGISTER (40 F.R. 5378) announcing that it had been determined preliminarily that benefits have been paid or bestowed on certain consumer electronic products from Japan under the three programs administered by the Government of Japan which constitute bounties or grants within the meaning of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. 1303). An amendment to the notice was published in the FEDERAL REGISTER on Mary [*sic*] 7, 1975 (40 F.R. 19853) stating that other programs alleged to result in the payment or bestowal of a bounty or grant within the meaning of section 303 of the Act have been terminated by the Japanese Government and/or are preliminarily determined not to result in the payment or bestowal of a bounty or grant. The amended notice provided for the submission of any relevant data, views, or arguments to the Commissioner of Customs. No written submissions were received pursuant to the amended notice.

Pursuant to the investigation, additional facts were developed regarding benefits to Japanese exporters under the Overseas Market development Program referred to in that notice in order to determine to what extent certain firms which are capitalized at less than one billion yen benefit from the program.

The information developed in the investigation established that benefits from programs involving preferential interest rate loans from the Japanese Development Bank,

promotional assistance from the Japan External Trade Organization (JETRO), and tax deferrals under the Overseas Market Development Reserve, involve an aggregate amount considered to be *de minimis* per dollar of value of the exported products.

Accordingly, on the basis of the additional facts gathered and the investigation conducted pursuant to section 159.47(c) Customs Regulations (19 CFR 159.47(c)), a final determination is hereby made in this proceeding, that for the reasons stated, herein and in the notice referred to above, no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), upon the manufacturer [*sic*], production, or exportation of certain consumer electronic products from Japan.

The notice is published pursuant to section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303).

G. R. DICKERSON,
Acting Commissioner of Customs.

Approved: December 31, 1975.

PETER O. SUCHMAN,
Acting Assistant Secretary of The Treasury.

[F.R. Doc. 76-318 Filed 1-6-76; 8:45 am]

[Irrelevant Notices Omitted in Printing]

Federal Register, Vol. 41, No. 4—Wednesday, January 7, 1976 [Page 1298]

[Exhibit F to Complaint]

BEFORE THE UNITED STATES DEPARTMENT OF THE TREASURY

NOTICE PURSUANT TO 19 U.S.C. § 1516(d) TO CONTEST THE DETERMINATION BY THE SECRETARY OF THE TREASURY UNDER 19 U.S.C. § 1303 THAT A BOUNTY OR GRANT IS NOT BEING BESTOWED ON THE MANUFACTURE, PRODUCTION OR EXPORTATION OF CERTAIN CONSUMER ELECTRONIC PRODUCTS FROM JAPAN

To The Honorable William E. Simon
Secretary of the Treasury
Washington, D.C.

On January 7, 1976, a "Final Negative Countervailing Duty Determination" in the case of *Certain Consumer Electronic Products From Japan* was published in the Federal Register. 41 Fed. Reg. 1298. The Determination stated that "a final determination is hereby made in this proceeding, that . . . no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), upon the manufacturer [*sic*], production, or exportation of certain consumer electronic products from Japan."

One of the complaints which led to this determination was filed with the Commissioner of Customs on April 3, 1970, by Zenith Radio Corporation, a domestic manufacturer of consumer electronic products. On behalf of Zenith Radio Corporation, we are hereby giving you notice, pursuant to 19 U.S.C. § 1516(d), of our desire to contest Treasury's negative determination before the United States

Customs Court, and we ask that you cause publication of this notice forthwith, as required by said 19 U.S.C. § 1516(d).

Respectfully submitted,

/s/ STEWART & IKENSON
Stewart & Ikenson

/s/ PHILIP J. CURTIS
Philip J. Curtis, Esq.

Attorneys for Zenith Radio Corporation

January 28, 1976

[Exhibit G to Complaint]

DEPARTMENT OF THE TREASURY

CUSTOMS SERVICE

[T.D. 76-71]

ASSESSMENT OF COUNTERVAILING DUTIES ON CERTAIN CONSUMER ELECTRONIC PRODUCTS FROM JAPAN

Petition Filed by American Manufacturer, Producer or Wholesaler

On January 7, 1976, a "Final Countervailing Duty Determination" in the case of Certain Consumer Electronic Products from Japan was published in the FEDERAL REGISTER, 41 FR 1298. The determination stated that a "final determination is hereby made, • • • no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), upon the manufacturer [sic], production, or exportation of certain consumer electronic products from Japan." The complaint which led to this determination was filed with the Customs Service on April 3, 1970.

On January 28, 1976, notification was received by the Department that Zenith Radio Corporation, an American manufacturer of certain consumer electronic products, desires to contest the above-noted negative determination.

In accordance with the provisions of section 516(d), Tariff Act of 1930, as amended by the Trade Act of 1974 (19 U.S.C. 1516(d)), publication is hereby made of the fact that the necessary notice has been received that an American manufacturer desires to contest the determination that a bounty or grant is not being bestowed, within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), on certain consumer electronic products from Japan.

LEONARD LEHMAN,
Acting Commissioner of Customs.

Approved: February 27, 1976

JAMES J. FEATHERSTONE,
Acting Assistant Secretary of the Treasury.

[FR Doc. 76-6701 Filed 3-9-76; 8:45 am]

[Irrelevant Notices Omitted in Printing]

Federal Register, Vol. 41, No. 48—Wednesday, March 10, 1976 [Page 10235]

UNITED STATES CUSTOMS COURT

[CAPTION OMITTED IN PRINTING]

Defendant's Answer

Defendant, answering the allegations of plaintiff's complaint, admits, denies, and otherwise responds thereto as follows:

1. Admits.
2. Admits.
3. Admits.
4. Admits.
5. Admits.
6. Admits.
7. Admits.
8. Admits.
9. Admits.
10. Admits.
11. Admits.
12. Admits.
13. Admits.
14. Admits.
15. Admits.
16. Admits.

17. Admits that the Commodity Tax Law of Japan provides, among other things, that a tax, known as a commodity tax, be levied on certain kinds of commodities manufactured in Japan, which have been shipped for home consumption, including all the electronic products enumerated in paragraph 17 of the complaint. Admits that gen-

erally the tax base of the commodity tax levied on electronic products manufactured in Japan and which have been shipped for home consumption, is the manufacturer's sales price. Denies that the manufacturer's sales price is the tax base for such products in all instances. Denies that the tax rates set forth in paragraph 17 are applicable to the enumerated products for lack of knowledge or information sufficient to form a belief as to the truth thereof. Admits that no commodity tax is applicable to the enumerated electronic products when they are shipped for export. Admits that when a commodity tax has been paid in relation to a product which is subsequently exported, the exporter is entitled to receive a refund of the tax. The allegations of paragraph 17 are denied in all other respects.

18. Admits that under the Commodity Tax Law of Japan the electronic products enumerated in paragraph 17 are exempt from payment of any commodity tax when they are shipped for export from Japan. Denies that the same articles when shipped from the manufacturer's factory for consumption in Japan are always subject to such a tax. Admits that under the Commodity Tax Law of Japan, when a commodity tax is paid on an article which has been shipped for home consumption but is later exported, the exporter receives a refund of such tax.

19. Denies.

20. Denies.

21. Denies.

22. All allegations of material fact contained in the complaint which have not been expressly admitted, denied, or qualified, are hereby denied.

WHEREFORE, defendant respectfully requests the Court to enter judgment holding that the Secretary of the Treasury properly determined that no bounty or grant is being

paid or bestowed, directly or indirectly within the meaning of section 303 of the Tariff Act of 1930, as amended, upon the manufacture, production, or exportation of the electronic products enumerated in the complaint from Japan, and denying plaintiff's requests for relief.

Respectfully submitted,

/s/ REX E. LEE
Rex E. Lee
Assistant Attorney General

/s/ DAVID M. COHEN
David M. Cohen
Acting Chief, Customs Section

/s/ VELTA A. MELNBRENCIS
Velta A. Melnbrencis
Civil Division, Dept. of Justice
Attorneys for Defendant.

June 10, 1976

New York, New York

[Filed: June 10, 1976]

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

UNITED STATES CUSTOMS COURT

[Caption Omitted in Printing]

Plaintiff's Motion for Summary Judgment

Pursuant to the provisions of Rules 4.12 and 8.2, Rules of the United States Customs Court, motion is hereby made for an order granting summary judgment in favor of the plaintiff and sustaining the claim in the subject civil action for the reasons set forth in the brief annexed hereto and made a part hereof.

Respectfully submitted,

/s/ EUGENE L. STEWART
Eugene L. Stewart, Esq.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 785-4185

/s/ FREDERICK L. IKENSON
Frederick L. Ikenson, Esq.
STEWART & IKENSON
1001 Connecticut Avenue, N.W.
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Telephone: (202) 785-4185

/s/ PHILIP J. CURTIS
Philip J. Curtis, Esq.
1900 North Austin Avenue
Chicago, Illinois 60639
Telephone: (312) 745-5133

Attorneys for Plaintiff

Dated: June 21, 1976

[Filed: June 23, 1976]

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

UNITED STATES CUSTOMS COURT

[CAPTION OMITTED IN PRINTING]

Plaintiff's Statement Pursuant to Rule 8.2(b)

Pursuant to Rule 8.2(b), Rules of the United States Customs Court, plaintiff respectfully submits that there can be no genuine triable issue with respect to the following facts:

1. Plaintiff is a domestic manufacturer of various consumer electronic products, including the following: television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, and color television picture tubes.

2. Plaintiff, in 1970, and the Magnavox Company, in 1972, filed with the Commissioner or Acting Commissioner of Customs petitions under 19 U.S.C. § 1303, alleging that bounties or grants were being paid or bestowed, directly or indirectly, upon the manufacture or production of certain consumer electronic products in Japan, or upon the exportation of certain consumer electronic products from Japan.

3. In 1972, both plaintiff and the Magnavox Company filed supplements to the petitions described in paragraph 2, *supra*.

4. Included among the bounties and grants which plaintiff and the Magnavox Company described in their submissions, discussed in paragraphs 2 and 3, *supra*, as being paid or bestowed on the exportation of certain consumer electronic products from Japan was the exemption of export shipments from a so-called "commodity tax," or the refund of such tax upon exportation, when previously paid.

5. On January 7, 1976, a "Final Negative Countervailing Duty Determination," in the case of "Certain Consumer Electronic Products from Japan," issued by the Acting Commissioner of Customs and approved by the Acting Assistant Secretary of the Treasury, was published in the Federal Register, 41 Fed. Reg. 1298, and contained the statement that: "a final determination is hereby made in this proceeding, that . . . no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), upon the manufacturer [*sic*], production, or exportation of certain consumer electronic products from Japan."

6. The "Certain Consumer Electronic Products from Japan" involved in the subject countervailing duty investigation which led to the determination referred to in paragraph 5, *supra*, included, *inter alia*, the following: television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes (hereinafter "subject electronic products").

7. On January 28, 1976, plaintiff, through counsel, served a Notice upon the Office of the Secretary of the Treasury, pursuant to 19 U.S.C. § 1516(d), as amended, advising of plaintiff's desire to contest the negative determination referred to in paragraph 5, *supra*, before the Customs Court, and requesting that publication of this Notice be made forthwith, as required by said 19 U.S.C. § 1516(d), as amended.

8. On March 10, 1976, a Notice, entitled "Assessment of Countervailing Duties on Certain Consumer Electronic Products from Japan," issued by the Acting Commissioner of Customs and approved by the Acting Assistant Secretary of the Treasury, was published in the Federal Regis-

ter, 41 Fed. Reg. 10235, and contained the announcement that notification had been received from the plaintiff that it desired to contest the negative countervailing duty determination referred to in paragraph 5, *supra*.

9. On March 11, 1976, the summons in this action was filed with the Customs Court on behalf of plaintiff.

10. Under the Commodity Tax Law of Japan (a) a tax known as a commodity tax is levied on the shipment for home consumption of certain kinds of commodities manufactured in Japan, including all the subject electronic products; (b) the subject electronic products are exempt from payment of any commodity tax when they are shipped for export from Japan; and (c) when a commodity tax is paid on an article which has been shipped for home consumption but is later exported, the exporter receives a refund of such tax.

11. As a result of the exemption of the subject electronic products from payment of any commodity tax when exported from Japan, Japanese exporters of the subject electronic products are able to sell such products in the United States market at a price lower than that at which they can sell such products in Japan or at a price that would assure a greater profit than could be earned in Japan.

Respectfully submitted,

/s/ Eugene L. Stewart
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1001 Connecticut Avenue, N.W.
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Telephone: (202) 785-4185

/s/ Frederick L. Ikenson
Frederick L. Ikenson, Esq.
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/s/ Philip J. Curtis
Philip J. Curtis, Esq.
1900 North Austin Avenue
Chicago, Illinois 60639
Telephone: (312) 745-5133

Attorneys for Plaintiff

Dated: June 21, 1976

UNITED STATES CUSTOMS COURT

[CAPTION OMITTED IN PRINTING]

[Plaintiff's Proposed] Order and Judgment

Upon reading and filing plaintiff's Motion for Summary Judgment and defendant's Cross-Motion for Summary Judgment and the parties' briefs and legal memoranda and all other papers and proceedings had herein, it is

HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff's Motion is granted and plaintiff's claim is sustained;

2. Defendant's Motion is denied;

3. The exemption, under the Commodity Tax Law of Japan, of television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes (hereinafter "subject electronic products") from a commodity tax, when shipped for export from Japan, or the refund of such tax on the exportation from Japan of the subject electronic products, constitutes the payment or bestowal of a bounty or grant within the embrace of 19 U.S.C. § 1303; and

4. The Secretary of the Treasury is directed to ascertain and determine, or estimate the amounts of the aforedescribed tax exemptions or refunds on the exportation of the subject electronic products from Japan and to order the appropriate Customs officers throughout the United States to assess countervailing duties, in amounts equal to the aforedescribed tax exemptions or refunds, on the subject electronic products exported from Japan, entered

or withdrawn from warehouse for consumption on or after the day following the date of entry of this Order.

_____

JUDGE

Dated: New York, New York

_____, 19—

UNITED STATES CUSTOMS COURT

BEFORE: HON. HERBERT N. MALETZ, *Judge*

[CAPTION OMITTED IN PRINTING]

Defendant's Cross-Motion for Summary Judgment

Pursuant to Rules 4.12 and 8.2, Rules of the United States Customs Court, defendant hereby cross-moves for summary judgment holding that the Secretary of the Treasury properly determined that no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303 of the Tariff Act of 1930, as amended upon the manufacture, production, or exportation from Japan of the electronic products enumerated in the complaint.

Defendant's motion is based on the annexed Statement of Material Facts and the annexed Brief and exhibits.

Respectfully submitted,

/s/ REX E. LEE
Rex E. Lee
Assistant Attorney General

/s/ DAVID M. COHEN
David M. Cohen
Acting Chief, Customs Section

/s/ VELTA A. MELNBRENCIS
Velta A. Melnbrencis
Civil Division, Dept. of Justice
Attorneys for Defendant.

[Filed: August 24, 1976]

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

UNITED STATES CUSTOMS COURT

BEFORE: HON. HERBERT N. MALETZ, *Judge*

[CAPTION OMITTED IN PRINTING]

Defendant's Statement of Material Facts

Pursuant to Rule 8.2(b), Rules of the United States Customs Court, defendant respectfully submits that there is no genuine issue with respect to the facts alleged in paragraphs 1 through 9, 10(b), and 10(c) of plaintiff's statement pursuant to Rule 8.2(b).

Defendant submits that there is a dispute with regard to paragraph 10(a) to the extent it states or implies that certain kinds of commodities, including all the subject electronic products, are always subject to a commodity tax (see para. 17 and 18 of the complaint and answer). Under our reading of the commodity tax law, no commodity tax is imposed when otherwise taxable commodities are sold to or for:*

(i) schools, other educational institutions, and educational use;

(ii) academic research organs and academic research use;

(iii) persons engaging in activities under the Social Welfare Services Act or engaging in activities related to social welfare or for use of institutions related to social welfare activities; and

(iv) the National Museum;

(v) other persons specified by Government ordinance.

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* See Article 22 of the 31 March 1962 Law No. 48 shown as attached Exhibit A, which is a purported English translation of the Japanese law deemed applicable by plaintiff and supplied by plaintiff's counsel.

Defendant further submits that to the extent that plaintiff deems the allegations of paragraph 11 of its statement relevant and material, there exists a genuine dispute of fact (see par. 19 of the complaint and answer). Plaintiff has failed to produce any proof whatsoever to substantiate this allegation, much less to demonstrate that there is no genuine dispute as to such facts.

Respectfully submitted,

/s/ Rex E. Lee
Rex E. Lee
Assistant Attorney General

/s/ David M. Cohen
David M. Cohen
Acting Chief, Customs Section

/s/ Velta A. Melnbrencis
Velta A. Melnbrencis
Civil Division, Dept. of Justice
Attorneys for Defendant.

New York, New York

UNITED STATES CUSTOMS COURT

Before: Hon. Herbert N. Maletz, *Judge*

[Caption Omitted in Printing]

[Defendant's Proposed] Order

Upon reading and filing plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment, the briefs in support of the motions, and all other papers and proceedings herein, it is hereby

Ordered, Adjudged, and Decreed that:

1. Plaintiff's motion be, and the same hereby is, denied;

2. Defendant's cross-motion be, and the same hereby is, granted; and

3. The Secretary of the Treasury's determination that no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303 of the Tariff Act of 1930, as amended, upon the manufacture, production, or exportation from Japan of the electronic products enumerated in the complaint, is hereby affirmed.

_____
Judge

Dated: New York, New York

This —— day of ————————, 1976.

[Exhibit A to Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment]

Commodity Tax Law

(31 March 1962 Law No. 48)

Related Laws (Tax Laws):

Revisions: 1962—Law 67, 1964—Law 22,
1965—Laws 30 and 31,
1966—Laws 34 and 39,
1967—Law 14, 1968—Law 13
1973—Law 22

Chapter 1. General Provisions

(Taxable Items)

Article 1. Commodity taxes will be levied on commodities given in the attached table in accordance with this law.

(Definitions)

Article 2. Meanings of terms used in this law are given below.

(a) Taxable commodities. These are commodities given in the attached table other than commodities which are not subject to commodity taxes in accordance with provisions of Article 9.

(b) Nontaxable commodities. These are commodities other than those given in the attached list.

(c) Bonded areas. These are bonded areas specified in the Customs Act (1954 Law No. 61), Article 29 (Kinds of Bonded Areas).

(Taxed Persons)

Article 3. Persons selling Class 1 commodities are obligated to pay commodity taxes on Class 1 commodities which have been sold (limited to those corresponding to taxable commodities).

2. Persons manufacturing Class 2 commodities are obligated to pay commodity taxes on Class 2 commodities which have been shipped from the factory of their manufacture (limited to those corresponding to taxable commodities).

3. Persons receiving taxable commodities from bonded areas are obligated to pay commodity taxes on taxable commodities received.

(Factories Corresponding to Bonded Areas)

Article 4. When a factory of Class 2 commodities corresponds to a bonded area, commodities manufactured at that factory which correspond to domestic cargo as provided in Article 2, Item 1, No. 4 (Definitions) of the Customs Act (including manufactured products specified under Article 59, Item 2 of the Customs Act (Domestic Cargo Use Etc.) other than those considered to be foreign cargo), that factory is considered to be a Class 2 commodity factory which does by a document specified by government ordinance giving details concerning export of the commodities and other information provided for by the same item.

3. Provisions of the previous two items apply to cases in which commodities held by a distributor of Class 2 commodities (excepting persons who are manufacturers of Class 2 commodities in accordance with provisons of Item 1) are exported for purposes of sale and are Class 2 taxable commodities. In this case, "an amount" in Item I will read "considering the commodity tax corresponding to the amount as having been paid by the distributor, that

amount," and "location of the factory of manufacture of the commodities" in the previous item will read "location of the sales depot specified in Article 27, Item 1 related to the export by that person."

4. The additional refund specified in the Common Rules of National Taxes Act (1962 Law No. 66) is not added to refunds specified in Item 1 (including cases covered by the previous item).

(Special Use Exemption of Commodities Related to Sale or Export)

Article 22. When a distributor of Class 1 commodities or a manufacturer of Class 2 commodities respectively sell items purchased in a manner determined by government ordinance for purposes of providing services specified below which are Class 1 taxable commodities given below or ships from the factory of their manufacture for purposes of sale Class 2 taxable commodities given below which are purchased in a manner specified by government ordinance for purposes of providing services specified below, commodity taxes related to the sale or shipment shall not be levied.

(a) Schools specified in the School Education Act (1947 Law No. 26), Article 1 (Range of Schools) and other educational institutions specified by government ordinance: Class 1 and Class 2 taxable commodities provided for educational use as determined by government ordinance.

(b) Academic research organs specified by government ordinance Class 1 and Class 2 taxable commodities provided for academic research use as determined by government ordinance.

(c) Persons engaging in activities given in the Social Welfare Services Act (1951 Law No. 45), Article 2, Item 2, Nos. 3 through 5 (Definitions) and other persons engaging in activities related to social welfare as determined by

government ordinance: Class 1 and Class 2 taxable commodities provided for use of institutions related to these activities as determined by government ordinance.

(d) The National Museum and others not specified in (c) above as determined by government ordinance: Class 1 and Class 2 taxable commodities provided for their use as determined by government ordinance.

2. Provisions of the previous item do not apply when a distributor of Class 1 commodities making a sale or shipment under the item respectively do not submit, with reports specified in Article 29, Items 1 and 2 for the month of the date on which the sale or shipment was made (limited to ones submitted within the time limits specified for the reports), documents specified by government ordinance which certify that the commodities were purchased by persons specified under the previous item in a manner specified in the previous item. However, this does not apply when provisions of the text of Item 6 have been applied.

3. Provisions of Article 17, Item 3 apply to cases under the previous item.

4. Persons specified under Item 1 who purchased Class 1 or Class taxable commodities specified under the same item must, by the last day of the month following the month of the day of that purchase, submit to the head of the competent district tax office of the location of the use a document giving information specified by government ordinance such as use of the commodity, name and quantity of the commodity, and the location of its use.

5. Persons specified in the previous item, for a period of two years from the date of purchase of commodities of the same item, must not use them for other than the use specified or transfer them. However this does not apply when the commodities are used for other than the use specified or transferred during the specified time period because of

unavoidable circumstances and approval of the head of the competent district tax office of the location of their use is obtained in accordance with procedures specified by government ordinance.

UNITED STATES CUSTOMS COURT

Memorandum—Appendix A

[Exhibit C to Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment]

Does Russia pay or bestow, directly or indirectly, any bounty or grant upon the export of sugar?

The following statement shows the relation of the Russian Government to the sugar industry.

1. The Government establishes the maximum price of refined sugar in the domestic market.

2. Estimating the demand for home consumption, it permits the refiners to put on the market, under a tax of 1.75 a certain limited quantity, well within the known home consumption.

3. When satisfied that a larger supply can be added without prejudice to current prices, it advances the limit of ouput to the refiners, with no increase in tax, but provides that any excess put upon the home market shall be taxed at 3.50 or twice the regular tax (1.75).

4. The interest of the individual refiner then lies in putting out all he can at a tax of 1.75 and none under the tax of 3.50.

5. The inevitable result is an excess of stock in the hands of the refiners as a whole, and to get rid of this surplus it is exported. Now, a method exists by which refiner A can get the benefit of the failure of refiner B to supply the home market with his full quota. Home refiner A becomes willing to pay refiner B a certain reward if he will export a certain portion of his alloted quota and give A the official evidence of such exportation, which enables A to sell in the home market at a tax of 1.75 an equivalent portion of the sugar produced by him (A) in excess of his quota.

6. The maximum prices fixed by the Minister of Finance are always reached by the trade, and are such as to give a very large profit to the producer, particularly in those provinces where owing to better economic conditions of the population, the demand for sugar exceeds the local supply from the stock entitled to withdrawal for consumption at a single tax. The ability of the producers of sugar in certain regions to obtain higher prices than those obtained in other regions, gives rise to the arrangement mentioned in paragraph 5.

8. It is impossible to know whether or not the Government had this in mind (an encouragement to export) in arranging its system of sugar taxation. That it results in a bonus from some source to those who export sugar, there can be no doubt. [*Sic*—no paragraph 7.]

9. The amount of such bonus, as shown by the reports of our consul at Odessa, is represented by the price of export certificates which are sold by the exporters of sugar to those refiners who have an excess of sugar for sale in the home market; the minimum price of such certificates is one rouble per pood. This arrangement enables the exporting refiner to sell his sugar for export at a price .50 roubles below the cost of production and still realize a profit of not less than .50 rouble per pood.

In view of these anomalous conditions, clearly created by the Government regulation of the sugar industry in Russia, this Department has come to the conclusion that Russia indirectly pays or bestows a bounty on the export of sugar within the contemplation of Section 5 of the Act of July 24, 1897, and that the minimum net amount of such bounty is .50 rouble per pood, i.e. equal to the minimum net profit realized by the exporter of such sugar over the cost of production; and that the amounts realized on the export of inferior grade of sugar are less in proportion to the respective values of the several grades.

A circular proclaiming the amounts of the bounties so ascertained and determined was accordingly issued on the 14th of February last (copy herewith).

A detailed statement of the Russian laws and regulations, and of the conditions created thereby, is found on pages 3334-3340 of the Congressional Record, Volume 34, No. 64, of the 21st ultimo, a copy of which is also submitted herewith.

UNITED STATES CUSTOMS COURT

[Exhibit 2 to Plaintiff's Reply Brief and Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment]

• • • • •

STATEMENT OF JOSEPH S. WRIGHT, CHAIRMAN OF THE BOARD, ZENITH RADIO CORP.

I am Joseph S. Wright, Chairman of Zenith Radio Corporation, and, among other things, a member of the newly-created Advisory Council on Japan-U.S. Economic Relations.

While our company is a leading member of the consumer electronics industry in the U.S. and many parts of the world, I wish to make it plain that I am speaking only for myself in this testimony and that while there are many people in our industry who share my views on many points, ours is an extremely competitive industry and it is composed of many diverse components which lead us to divergent points of view on most any subject that you could name.

I would like to tell you a little something about our industry as a background. I know the Committee does not wish to get involved in the details of a particular industry or company, except insofar as it contributes to a better understanding of our country's over-all trade problem. If I seem to be dwelling over much on Zenith and our industry, I hope you will understand that it is not intended to ask this Committee to solve the problems of a particular industry. I only hope that the background of our experience can be helpful to you in arriving at a better understanding of the nation's over-all trade problems.

Zenith was a small company, started on a kitchen table more than 50 years ago, and has grown and prospered to its present size by achieving a reputation for quality and integrity among dealers and consumers of our products

throughout the world. We are not a conglomerate, but have specialized in consumer electronics over the years. We have played a major role in almost every development in our industry. We have also played an important part in producing highly sophisticated electronic products and systems for national defense, although from a dollar standpoint this is a small part of our business. Our sales volume in 1970 was 573 million dollars and our average employment in the U.S. was approximately 20 thousand people. In addition to our own direct employment, we provide employment for many thousands of other people who make components which we use in our operations—tuners, speakers, semi-conductors, capacitors, tubes, cabinets, and a host of other products. We are the largest producer of TV receivers both black-and-white and color, having produced and sold more than 2 million TV receivers per year for many years. Last fall we produced our 25 millionth TV receiver, and up to now every one of these sets has been made in the U.S. In addition, we are the largest exporter of such products from the U.S. and have fought for many years to open up foreign markets for American made products. I deeply appreciate the opportunity to appear before this Committee to tell you about some of our experiences and some of the problems that we see facing our country and our foreign trade, employment and balance of payments problems.

I would like to start out by saying that I think we do ourselves a very grave injustice when so often we discuss this matter of our trade policy by using the polarizing terms of "free trade" and protectionism." [*Sic.*] These are emotional tags which stir people up one way or another and they really work against our ability to solve some of these most difficult problems.

THE CONDITION OF OUR INDUSTRY

The consumer electronics products industry has for all of its existence been one of the most highly competitive,

efficient and innovative industries in our country. It has made our mass communications the best in the world. Long before there was any competition from foreign imports, our industry invariably passed on to the public in the form of lower prices and better products, the full benefit of our growing technology and productivity. As a matter of fact, from 1950 to 1963, in the face of rising prices and wage costs throughout the economy, the average unit prices of black-and-white television receivers decreased by more than one-third. Television receiver production has always been so extremely competitive that the mortality rate of the companies in the business has been very high. Many great names in our industry just in the past 15 years have found the going so tough they got out of the business—Capehart, CBS, Dumont, Hotpoint, Stromberg-Carlson, Westinghouse, Webcor to name just a few.

I would like to show you a chart which contains the Bureau of Labor statistics consumer price indices from 1952. You will note that the 1970 index of prices for all products and services stands at nearly 150 from the base year of 1952, while the indices of prices for TV and radio have steadily declined from 1952 and stand at 72 and 68 respectively. This has been accomplished in the face of sharply rising wages and costs of purchased materials. Remember also that radios in 1970 have FM and often stereo; and that TV is not the small screen black-and-white of 1952 but in 1970 includes large screen color and vastly improved products from the standpoint of service and reliability. You will note that this steadily declining index of prices, despite tremendous product improvement antedates by a long time the flood of imported products which has in the past few years virtually inundated our industry.

I dwell on these points with some pride only to show that our situation is not that of an industry which has lost its vigor and must be protected from more efficient competitors abroad. On the contrary, the prices of our products

are lower in the United States than in any country in the world, including Japan and Germany.

I have attached to this statement a series of charts entitled "U.S. Imports in the Consumer Electronics Industry," which are graphic presentations of official Electronic Industries Association statistics showing what has been happening in the major categories of our business from 1960 through the first quarter of 1971. The red parts of the bar showing imports have an added broken line which shows the portion of imports which are under U.S. label; the balance, of course, are under foreign labels. The numbers are all in units produced or imported.

In the late 1950's, millions of low-priced Japanese transistor radios poured into the United States. As shown in the charts, by 1960, 55 percent of all portable radios sold in the United States were of Asiatic origin. By 1968, this figure rose to almost 95 percent and has remained at almost that level through the first quarter of 1971. For total radios, including portables but excluding automobile radios, imports accounted for approximately 91 percent of the market in 1970 and we estimate that the U.S. will produce less than 5 percent of the whole U.S. home radio market of about 40 million sets in 1971. Except for certain specialty types, the manufacture in the United States of radios was made economically impossible within ten years of the invasion by the Japanese.

I would like to turn now to television products. As shown in the charts, in 1962, monochrome imports, exclusively from Japan, held 2.4 percent of the total black-and-white television market of 6 million 609 thousand units, but in 1970, imports accounted for 51 percent of the total U.S. market of 7 million 47 thousand black-and-white units and, as you can see from the charts, imports held approximately this same share in the first quarter of 1971. Imports have thus increased their percent share of the U.S. market by

over 20 times in a black-and-white television receiver market which will continue to be of great importance, despite increased color television receiver sales. While 90 percent or more of the imported receivers since 1960 originated in Japan, in recent years black-and-white television receivers are beginning to be imported in quantity from Taiwan, Mexico, and other countries, as American manufacturers have sought to compete with the Japanese.

In the area of color television, in 1965, imports from Japan were only 2.6 percent of the total color market of 2 million 649 thousand units, but in 1970, imports—almost all of which came from Japan—held almost 18 percent of the total U.S. market of 5 million 219 thousand color units. This increase of market share of seven times in a short span of five years has brought us to the point that in 1970, one out of every six color television sets sold in the total U.S. market—a market which doubled between 1965 and 1970—was imported.

Obviously, this continuously increasing flood of imports has had an extremely adverse effect on our balance of trade. In 1969, the balance of trade in consumer electronic products was a negative 890 million dollars, while in 1970 this deficit rose to over 1 billion 75 million dollars. United States consumer electronic exports were only approximately 77 million dollars. Actually, the deficit is even greater since the value of imports is understated in that they are valued f.o.b. country of origin and do not include freight, duty and insurance. In 1970 the U.S. consumer electronics market reached 4 billion 69 million dollars and, even on an understated dollar basis, imports captured over one-fourth of the total U.S. market.

Since the beginning of the Japanese invasion into the U.S. consumer electronics market, many American manufacturers, fighting to survive, were forced by this competition first to purchase components from Japanese sources and, when this measure proved insufficient, to make or procure their sets in Japan, Hong Kong, Taiwan, and now Mexico. An alarming movement of American plants to Asia has taken place. Hong Kong, Taiwan and Mexico, providing incentives including cheap labor, have become the new sites of many former American based factories. This trend for survival by moving American plants out of our country is continuing at an alarming rate. Although we have never purchased television sets offshore, even in the face of the great invasion of Japanese television receivers over the years, Zenith also was forced to open a large new plant in Taiwan two months ago in which we may ultimately employ several thousand people.

In 1971, Zenith's average employment in the United States is forecast to be down by approximately 5 thousand jobs compared to our average employment in 1968. This is in large part due to the competitive necessity of making, or having made offshore, products which we had planned to produce here in the United States. If we considered the loss of employment in our television receiver manufacturing operations alone for the same period, the number of lost jobs would be significantly greater. Department of Labor figures show that between October 1966 and October 1969, there was a loss of 20 thousand 3 hundred jobs in manufacturing radios and TV receivers in the United States, and between October 1969 and November 1970 there was a further loss of 27 thousand 4 hundred jobs for a total loss of such jobs during these four years of 47 thousand 7 hundred.

What has happened in the finished goods end of our industry has also, of course, had a substantial impact on the even larger labor force engaged in the components industry—on the people who make coils, picture tubes, speakers, tuners and the like. Most of these companies have also established offshore facilities in the low labor cost countries of Hong Kong, Taiwan and Korea in order to support runaway set production.

One of the most distressing aspects of Zenith's reduction of work force as a result of imports is its impact upon our program for providing training and employment opportunities for the unemployed and under-employed drawn largely from minority groups in the Chicago area. In the last several years, we have invested a great deal of money and time and effort to recruit and train members of such minorities as blacks, Puerto Ricans, Mexicans and Cubans from the Chicago area, to the point where they represented a large and significant portion of our total employment.

In addition to our own financial investment, we have carried out government contracts for training and employing the chronically unemployed and underemployed. This has resulted in our giving good jobs to several thousand members of minority groups, who developed pride in their work and in having the kind of economic opportunity that would permit them to raise substantially their standard of living. The loss of jobs resulting from imports has fallen heaviest upon the most recently added people in our work force who, for the most part, are non-whites. This is required under union rules, and I do not known [*sic*] any other way to reduce our work force under such conditions, even if we did not have such rules.

PAST TRADE POLICY

The U.S. has been for many years a world leader in efforts to achieve reciprocal trade between the developed nations, with a minimum of commercial burdens by way of tariffs, commercial red tape and all the other non-tariff barriers to trade. As you are well aware, we are signatories to the General Agreement on Tariffs and Trade, and have taken the leadership over the past twenty-odd years in reducing our own tariffs and other trade barriers into the U.S., purportedly receiving reciprocal undertakings on the part of the other great trading nations.

Over the years, these GATT agreements have provided for substantial reductions in U.S. tariffs on consumer elec-

tronic products. We have purportedly secured corresponding reductions in tariffs on U.S. electronic products imported into highly developed industrial countries such as Japan. Unfortunately, we seem to have a peculiar American tendency not to fare very well in negotiating international agreements. As Will Rogers said, we have never lost a war nor won a conference. The fact is that while our GATT arrangements have opened up the U.S. markets to imports on a large scale, we are still left with systematic discrimination against American consumer electronics throughout most of the world, with high tariffs and a whole host of non-tariff barriers which, separately or in combination, prevent any effective U.S. export competition.

Let us see what kind of reciprocal trade policy regarding tariffs the U.S. established with Japan under GATT's "Kennedy Round" which is now in effect. From 1968 to 1972 U.S. import tariffs on imported TV sets were to be reduced from ten to five percent at the rate of one percent per year. During the same period the Japanese duty on imported sets was to be reduced from 24 percent to 15 percent. Forgetting for the moment about the fact that the U.S. duties are based upon an f.o.b., Japan price while the Japanese duty is based upon a c.i.f., landed price, thereby making the effective Japanese rates even higher, at the end of the Kennedy Round we were left with about a three to one ratio between Japanese and U.S. tariffs on imported television sets.

During my testimony before the House Ways and Means hearings on international trade in June of last year, we suggested that perhaps instead of import quotas, the interests of the U.S. would best be served by a moderate upward revision of tariffs on consumer electronics. We could see no reason why our Japanese friends should complain if our tariffs were partly equalized by raising them to those of Japan. How did the Japanese respond to such a suggestion? The August 6, 1970 issue of *The Japan Eco-*

nomic Journal carried a story entitled "TV Tariff Cut Sought" containing the following introductory paragraph:

"The Electronic Industries Association of Japan has decided to appeal to the Ministry of International Trade and Industry for reduction of Japan's import tariffs on American and other foreign television sets to about the same level as the U.S. equivalents."

Subsequently, in December, the same paper contained an article stating that tariff rates were due to be slashed in April on radios, TV sets, gramaphones and record players. Rates on these items were to be uniformly cut to 7.5 percent.

While this sounds like a major step in the right direction, the fact is that 7½ percent of nothing is really no better than 18 percent of nothing, because there are no American sets on the Japanese market, and you can be sure that our Japanese friends will bend every effort to keep it that way.

JAPAN'S CLOSED MARKET

In order to support her invasion of the U.S. TV set market with the use of extremely low pricing policies, Japan has maintained a closed market to imports of television products and has fixed and kept domestic prices at artificially high levels. With a closed domestic market, insulated against foreign competition, domestic prices can be easily fixed at a high figure. It has been reported that the Fair Trade Commission in Japan recently found six of the larger Japanese TV set makers guilty of fixing retail prices in Japan and that decision coupled with the TV dumping case here in the United States appears to have the Japanese consumer quite upset for he has realized that he has been subsidizing exports to the U.S. by paying higher than necessary purchase prices, as well as higher taxes to support Government subsidies. Furthermore, according to press reports, delegates to the National Consumer Association's Convention, a group representing 20 million consumers or one-fifth of Japan's total population, meeting in Tokyo last November, decided to boycott all products sold by one of the largest Japanese set manufacturers because of its refusal to disclose its pricing structure on color television sets. At the Convention it was also decided to launch a "non-buying" campaign against color television receivers of all Japanese brands. Last March, it was reported that the boycott campaign against all of the products of that large manufacturer had been lifted in view of the fact that that company had accepted the Fair Trade Commission's charge on price fixing, apparently admitting that such practices had existed.

If the Japanese market were completely open and competitive as is the case in this country, television receivers could be manufactured in the United States and successfully sold in Japan at competitive prices. The Japanese Electronics Industry Association admits that large screen TV receivers made in the U.S. could be delivered to a Japanese importer for a total cost of about $449 even prior to the April tariff reductions. Similar large screen Japanese sets have carried list prices of from $1,200 to $1,600 in Japan. A similar large screen Zenith set with an advanced premium Chromacolor tube carries a suggested retail price of $579.95 in the U.S. A U.S. factory worker in Chicago making $3 an hour must work 193 hours to buy our large screen color set (forgetting about taxes for the moment) while a Japanese factory worker in Japan making 73 cents an hour (excluding his bonus and benefits) must work 1,860 hours, or almost ten times as long, to buy the Japanese set.

It would, therefore, appear that Japan would be a great place for U.S. TV manufacturers to sell sets, but even with the recently lowered tariffs a whole host of barriers still prevent American entry into the Japanese market. Our attempt to enter the market of several years ago was

blocked. A recent market study indicates that, while some of the barriers to our entry have theoretically eased somewhat, there are still clear-cut obstacles. Japanese government regulations still block free entry of necessary repair parts, and the Japanese are notorious for applying what they call "administrative guidance" to influence sales outlets in their handling of imported goods.

DUMPING

It has long been a well recognized principle in our law that the practice of dumping goods into the United States at prices far less than they are sold for in home or other markets is unfair and illegal. This has nothing to do with whether you are a "free trader" or "protectionist" or anything in between these polarizing terms.

The reason behind this principle is obvious. Dumping is a method of international price competition or, more properly, price discrimination between national markets which is of economic significance to both the exporting country, for example Japan, and the importing country, the U.S. Dumping is simply selling the same commodities at different prices in different markets. Dumping occurs when merchandise is imported into the U.S. and sold for less than the price for which the merchandise is sold in Japan, taking into consideration the conditions and expenses of sale. It is an undesirable method of competition because the resulting cheapness is not due to basic superiority in production efficiency in Japan.

I am sure it is clear that with a closed domestic TV market in Japan, dumping TV sets into the U.S. is an easy task since domestic prices fixed at a high figure help support dumped prices here in the U.S., and incremental costing is used for export pricing. Following a lengthy investigation, the Secretary of the Treasury announced on December 4, 1970 his determination that television receivers imported from Japan were being, or were likely to be, sold

in the United States at less than fair value as compared to sales made in Japan. The U.S. Tariff Commission then, in accordance with Federal anti-dumping law, conducted an investigation to determine whether "an industry in the United States has been or is likely to be injured" by this unfair practice, a finding necessary, under the law, before additional duties can be imposed.

After a thorough study, the Commission on March 4, 1971 unanimously ruled that ". . . the imports of television receivers from Japan, sold at less than fair value, have adversely affected the prices of comparable domestically produced receivers in the U.S. and have caused substantial loss of sales by U.S. producers." In order to correct this unfair practice, all shipments of color television receivers from Japan to the United States since September 1970 will now be examined by the Treasury Department to determine to what extent additional duties are required to be assessed. While the amount of these extra duties is not known due to the nature of the dumping proceedings and will probably vary from set to set, these findings should result in fairer TV set price competition by Japanese imports in the United States market.

SUBSIDIES

In the area of Japanese government export subsidies and incentives, there is good reason to believe that the Japanese government provides a whole host of subsidies beginning with the remission of a commodity tax and including such things as export credits, accelerated depreciation and a variety of other tax advantages and insurance against loss in export. While these bounties and grants are a little difficult to find in the original Japanese statutes, they are effectively summarized in a State Department memorandum of November 6, 1968 entitled "Japan's Export Promotion Techniques." The existence of such bounties and grants thus discloses yet another factor contributing to

Japan's success in the U.S. consumer electronic products market.

INDUSTRY GOVERNMENT COOPERATION

There is one subject that I am glad to see get increasing attention in the United States at the present time and that is the proper relationship between government and the business community in this whole area of international business and trade practices. The scheduling of this hearing itself is a further indication of the increasing interest in the trade problems of U.S. business. All of us who had any exposure to Japanese competition are immediately struck by the tremendous difference that exists between the Japanese outlook on this subject and our own. In dealing with Japanese competition or in seeking to penetrate the Japanese market, one is immediately struck by the great difficulty in discerning where Japanese business ends and the government begins. There apparently is a way by which the Japanese business community and the Japanese government arrive at some concensus of what serves best the national interests of Japan, and then both government and industry do what is necessary to carry out the program. We, on the other hand, fight among ourselves and with the government and there is probably a large feeling on the part of the business community that many people in our federal government who deal with high level negotiations on trade matters are thinking almost wholly of political and diplomatic considerations and have no real understanding of or interest in the practical day-by-day problems of business. I am sure this is not a one-way street and our government people may similarly feel that the business community is preoccupied with its problems and not sufficiently interested in the political and diplomatic headaches.

It is interesting as background to the Japanese government-industrial combination, which has sometimes been called Japan, Inc., that is [*sic*] many cases it was the government itself which fostered business enterprises as gov-

ernment functions and that private business firms were formed to take them over. It has been suggested that this may explain what still remains as an unusually close working relationship between Japanese business and government.

This brings me to a related subject. The Japanese are great pragmatists and they have an exceptional ability quickly to adapt their course of action to the realities of the situation. Despite the fact that there has been a great outcry by the Japanese on the textiles, shoes, steel and electronics issues, they have felt considerable pressure from various domestic industry sources and from their government to moderate their assaults on our market through dumping and other similar practices. But when we have widespread publicity campaigns against "protectionism" and organized efforts to stop any enactment of new laws, or against enforcing old laws, our Japanese friends are misled into thinking that American public opinion will permit them to continue dumping and similar unfair practices and that they can continue keeping a closed market to American manufactured goods with various discriminations against our products.

It is only by convincing them fully and finally that we really mean business that they will ever decide that they really must put their house in order both at home and abroad. And only this Congress and the federal government can do the convincing.

FUTURE TRADE POLICY

Up to this point, I have directed most of my remarks to telling you what our problems are. I wish I could see the answers as clearly as I see the problems.

Most of us in our industry recognize that as a long range-solution, import quotas have as many built-in problems as they would solve and I have never seen any machinery for working them out without serious risks of arbi-

trary and unfair action, not to mention the temptations of possible political corruption. I would be in favor of import quotas only as a short-range method of dealing with the situation, if it would give our government the muscle and the authority to force a rationalization of our trade with certain countries such as Japan.

I mentioned earlier that we have just opened a new plant in Taiwan. This probably will not be our last offshore plant and in the next few years, lacking some change in our Administration's trade policy, more and more of our productive facilities for serving the U.S. market will have to be located in foreign countries.

Our market studies tell us that with projected new family starts and population growth, and with the products we see immediately at hand, the consumer electronics products industry business in manufacturers sales and imports will increase from the current 4 billion dollars plus to 5 billion 5 hundred million dollars in the next five years. Projecting the increase in imports as a share of the domestic market at the rate by which they have increased over the past three years, the current 1 billion 153 million dollar import figure contributing to the massive negative trade balance in our industry alone will increase to 3½ billion dollars and represent approximately 60 percent of our industry by 1976. It is hard to believe that this can happen to a high-technology industry which has been so effective in the U.S. that it has been able to produce and sell at prices which are far below the applicable prices in any other principal country of the world despite our American wage scales.

While we are certainly pleased to see the Treasury Department active in anti-dumping matters, there is much the Secretary could and should do under another Federal statute. For some 70-odd years we have had on the books a statute which requires the Secretary of the Treasury to impose countervailing duties in the amount of any bounty

or grant which is made in connection with the import of dutiable articles into the U.S. It currently appears in Section 303 of the Tariff Act of 1930. Congress originally enacted this statute on the theory that while it was perfectly proper for domestic industries to compete in the areas of productivity, efficiency, price, and quality it was not fair to ask them to compete with foreign government subsidies. Many years ago this statute was upheld by the Supreme Court as a mandatory requirement on the Secretary.

As far as I know this section of the law had been a dead letter and the Treasury Department still has not made up its mind what its policy ought to be on countervailing duties. On two occasions over the years the Treasury Department has recommended to Congress that the countervailing duties statute be amended to limit the Secretary's duty to impose countervailing duties to cases where he found injury to a domestic industry and to completely exclude from the statute the remission of commodity taxes, a familiar device used by Japan and other nations to subsidize their exports. In each case Congress has refused to amend the statute with the result that while it leaves him no discretion the Secretary has in fact acted as if he had complete discretion.

We filed a Petition with the Secretary more than a year ago pointing out indicated areas of large direct subsidization of Japanese exports to the U.S., and I understand a countervailing duty petition by the steel industry has been pending since October 1968. I respectfully suggest that if we are not going to enforce this basic statutory principle of our foreign trade policy we must then face the burden of devising a competitive American system of export subsidies that will put us on a fair and equal footing. I really do not recommend the latter course because I do not think it is a contest we can win. Instead we should face up to the realities and enforce the law the way it is written.

In another area, the Assistant Attorney General in charge of the Antitrust Division has taken a peculiar and ambivalent position. For example, while he is closely watching for violations of the law by U.S. businessmen, he apparently has chosen to take no action against those who have dumped imports into the U.S. is [*sic*] criminal violation of Sec. 72. Title 15 of the U.S. Code which is part of the Revenue Act of 1916. The Assistant Attorney General, if anything, appears to be biased away from helping the U.S. businessman injured by imports for he has gone on record in recent testimony before the United States Tariff Commission stating that in determining forces responsible for alleged injury, he is confident that in a number of cases the role of imports will be found to have been greatly exaggerated. And he has taken no apparent note that the Japanese export TV pricing and practices in the United States through their U.S. is criminal violation of Sec. 72. Title 15 of the U.S. Code which is part and illegal under our laws as the Japanese government found their domestic pricing to be under their laws. [*Sic.*]

The foregoing are just a few of the many examples available to illustrate how U.S. trade policy can again be placed in the proper posture merely by enforcing existing U.S. law.

In the past, we have seen legislation introduced to liberalize the escape clause and adjustment assistance provisions of our tariff laws. It is difficult to believe that a solution to our complex foreign trade problems lies in such factors as adjustment assistance to workers and firms where the cost of such a program must be borne by all taxpayers and is in no way charged to the damage-causing imports and practices. At the heart of the problem is the displacement of workers, and we do not believe the answers to our problems lie in making it easier for such individuals to get relief.

In the area of new legislation, we believe it is important that limits be set on the time given to the Treasury Department to act on dumping and countervailing duty matters. We believe that if the executive branch of the government refuses to enforce the laws, then business should be given standing to enforce appropriate laws in the courts so it no longer need wait for the government to act. Along these lines, it is heartening to see legislation such as S. 1476 recently introduced by Senator Fannin for himself and others help protect American business from unfair foreign competition.

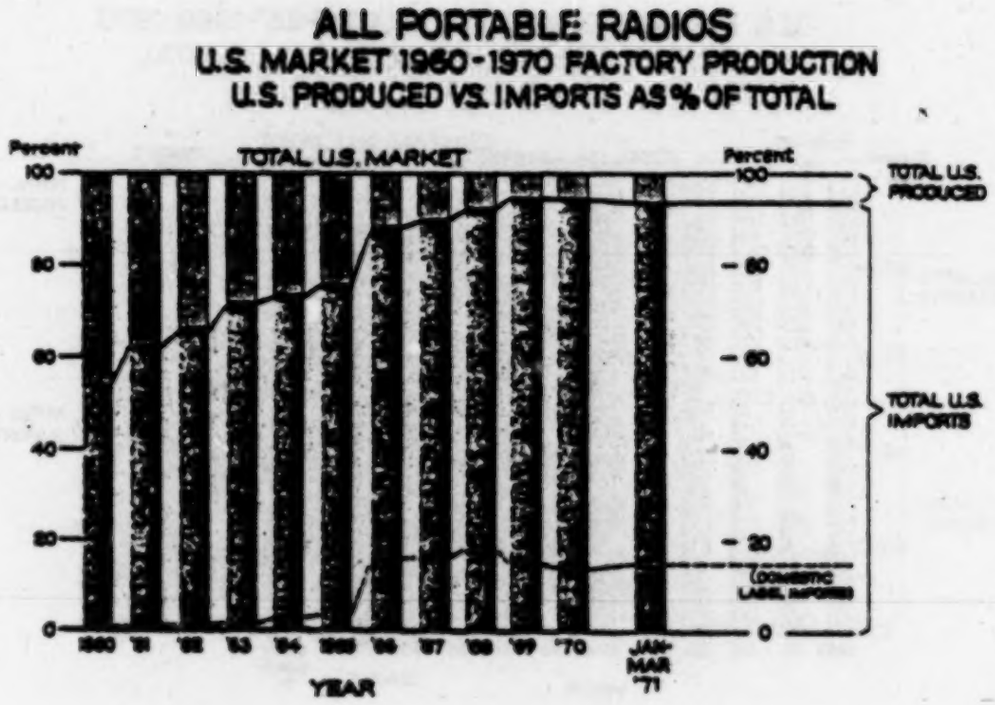
The previously mentioned Revenue Act of 1916, condemning international price discrimination injurious to competition and providing criminal sanctions as well as civil redress, apparently was intended to be a part of the antitrust laws. Senator Fannin's bill expressly declares the 1916 Act to be one of the antitrust laws as it was intended to be. As an antitrust law, the amendment would provide the government and injured persons with the remedy of injunctive relief, prescribe the statute of limitations to be tolled for injured persons during government proceedings and further encourage enforcement by business by making available government judgments and decrees as *prima facie* evidence in private suits.

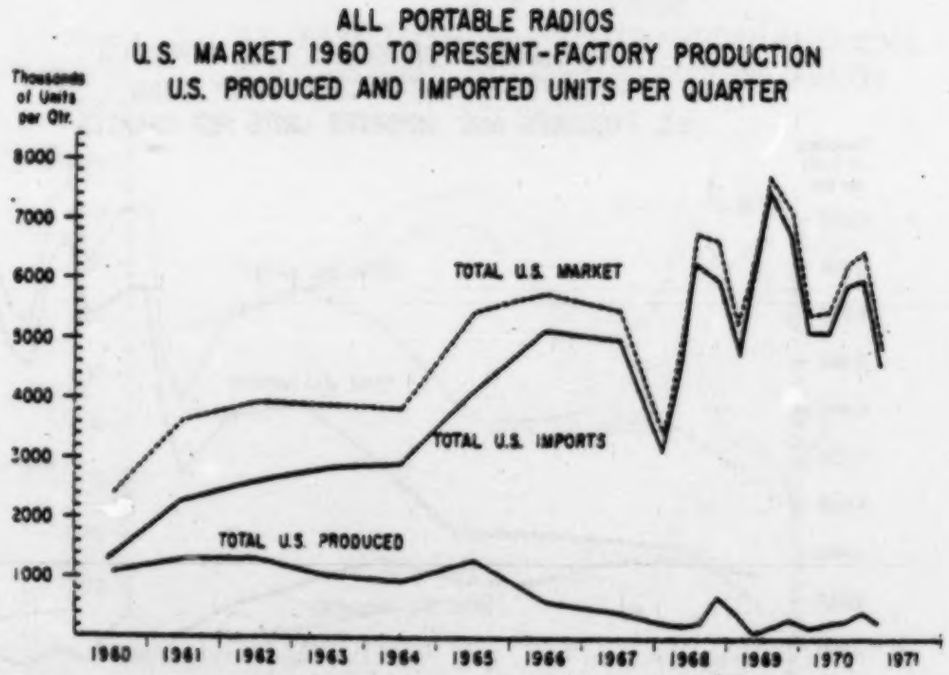
One of the most powerful aspects of the bill relates to gathering the necessary evidence which appears to be the biggest bottleneck in enforcing anti-dumping laws. With the amendment, in a suit under the 1916 Act, failure to comply with requests for evidence would result in the withholding of imports alleged to be dumped until there is compliance with the court's request. This provision would certainly speed up determination of the case thereby reducing the extent of injury to American business. With these amendments to the 1916 Act, injured U.S. industries would not have to wait for the government to act since they would have a new, effective weapon with which to fight unfair import competition.

CONCLUSION

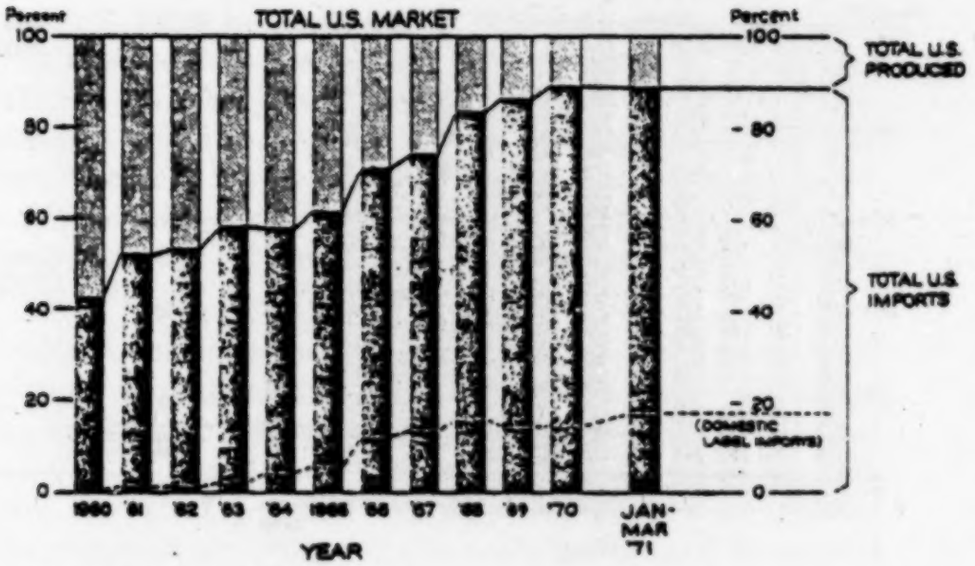
Traditionally, the United States has opened its doors to the trade of the world. We have a challenge in our industries and in our government to be as hard-nosed and practical in dealing with our trade problems as our trading partners have been. If we do that and insist that trade with our trading partners to [*sic*] be put on a reciprocal, rational and fair basis, then our industries with their tremendous resources of engineering and technology, of production and of marketing know-how will compete effectively both here and abroad, and despite the very obvious advantages that are inherent in such factors as the much lower wage levels of the Far East.

May I conclude by saying that we are most encouraged by the recognition of the members of this Subcommittee of the need for a re-evaluation of the competitive position of the U.S. in world trade. Hopefully, your investigation will have a salutary effect on those government agencies charged with carrying out our trade policy and through it the Congress and the public can be made more aware of our nation's trade policies and their impact on our economic well-being.



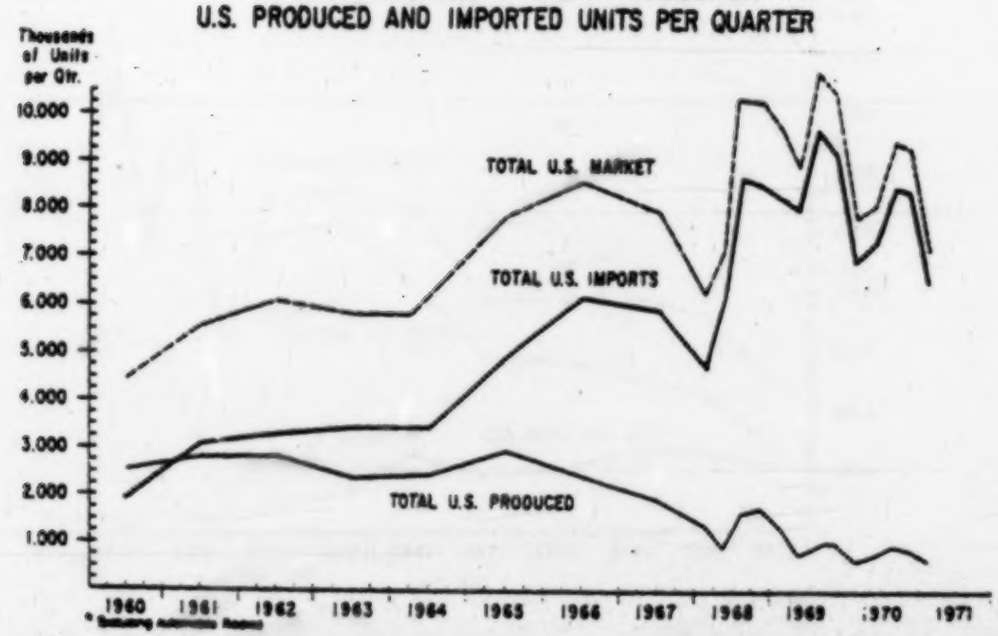


U.S. MARKET FOR RADIOS - ALL TYPES* - 1960-1970
U.S. PRODUCED VS. IMPORTS AS % OF TOTAL FACTORY PRODUCTION



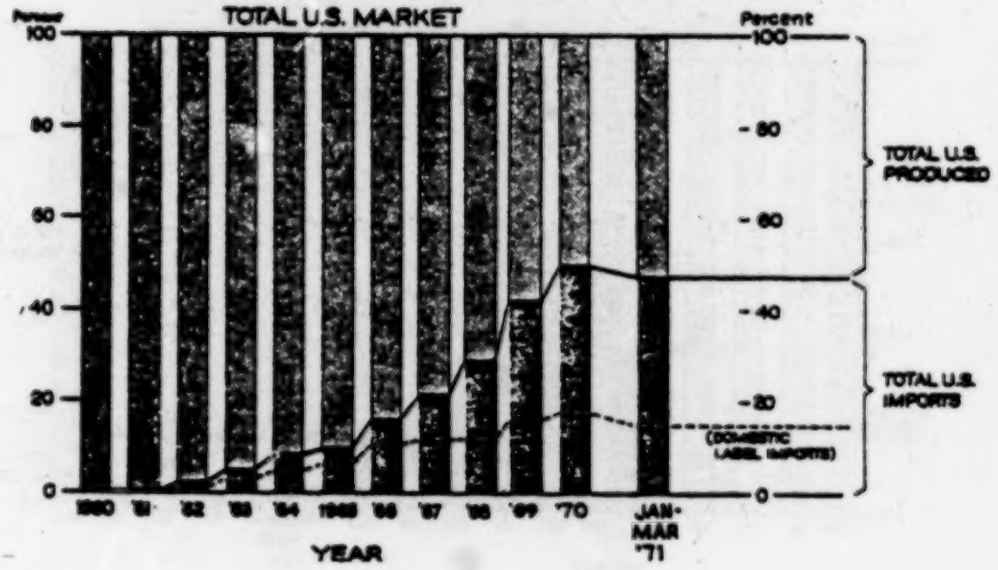
* Excludes Automobile Radios

U.S. MARKET FOR RADIOS - ALL TYPES*
1960 TO PRESENT-FACTORY PRODUCTION
U.S. PRODUCED AND IMPORTED UNITS PER QUARTER

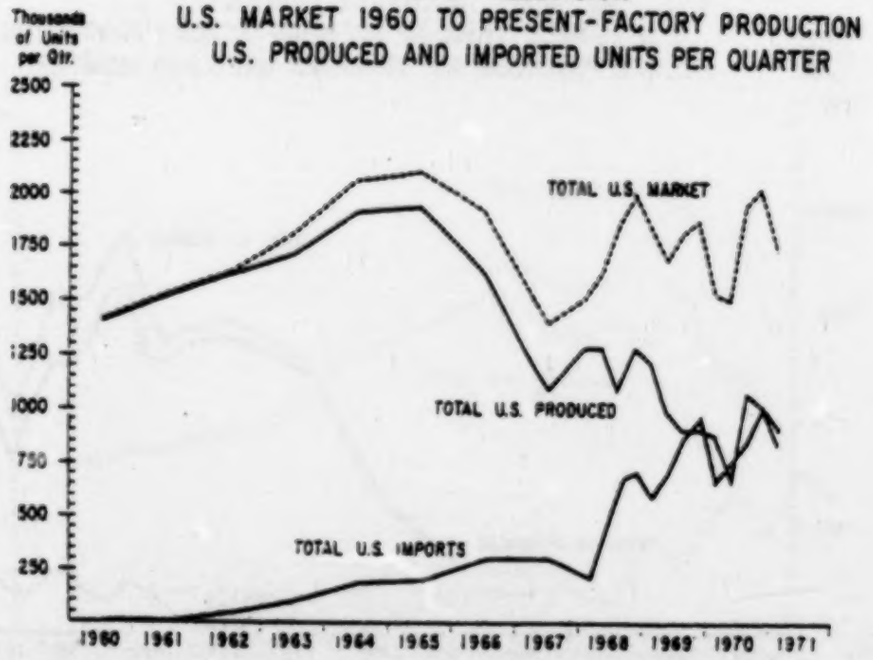


* Excluding Automobile Radios

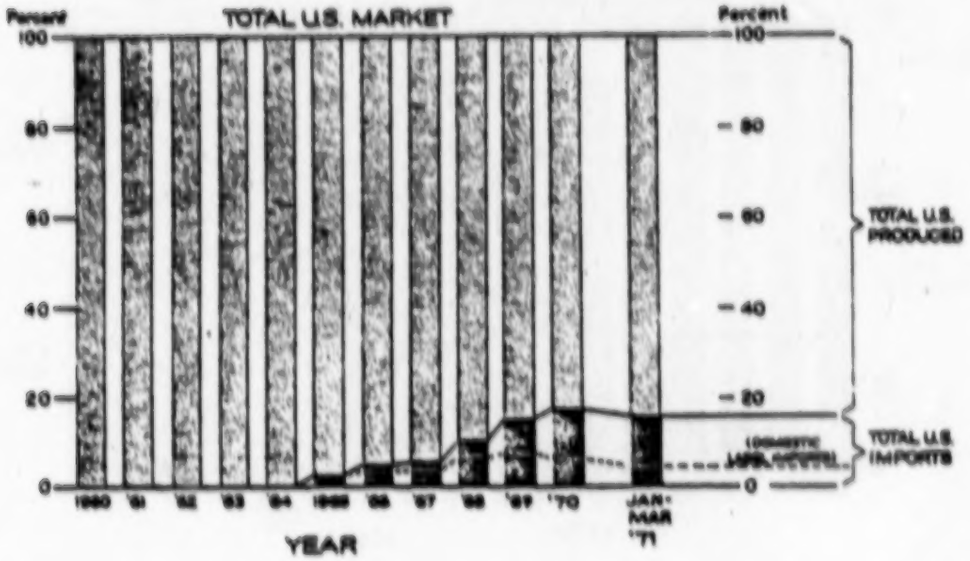
B/W TELEVISION
U.S. MARKET 1960-1970 FACTORY PRODUCTION
U.S. PRODUCED VS. IMPORTS AS % OF TOTAL



B/W TELEVISION
U.S. MARKET 1960 TO PRESENT-FACTORY PRODUCTION
U.S. PRODUCED AND IMPORTED UNITS PER QUARTER



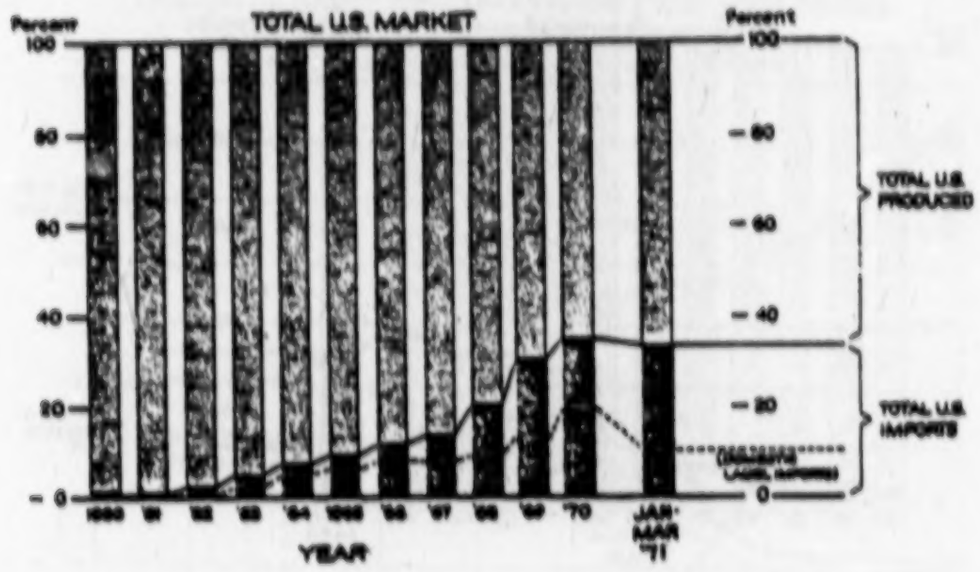
COLOR TELEVISION
U.S. MARKET 1960-1970 FACTORY PRODUCTION
U.S. PRODUCED VS. IMPORTS AS % OF TOTAL



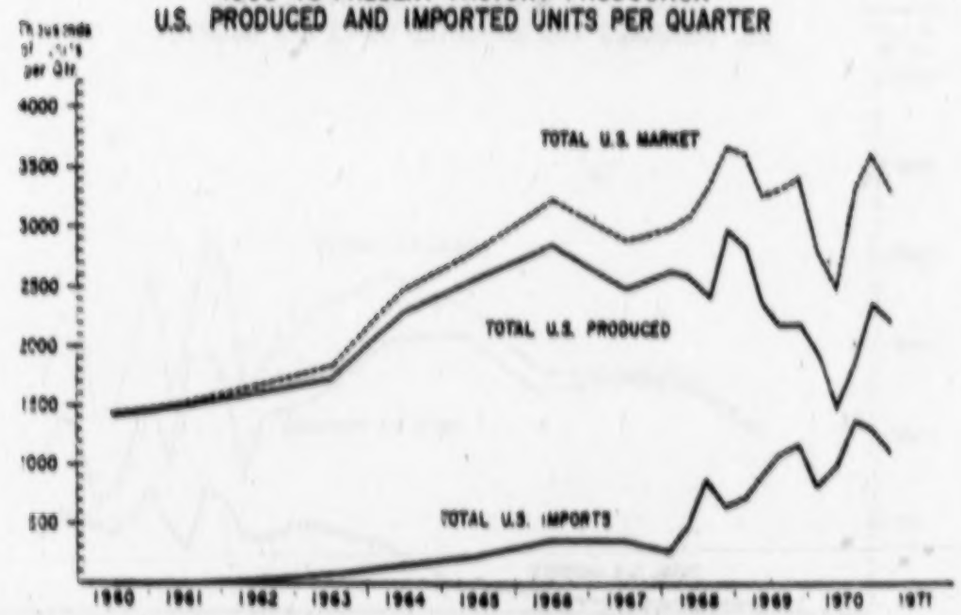
COLOR TELEVISION
U.S. MARKET 1960 TO PRESENT-FACTORY PRODUCTION
U.S. PRODUCED AND IMPORTED UNITS PER QUARTER



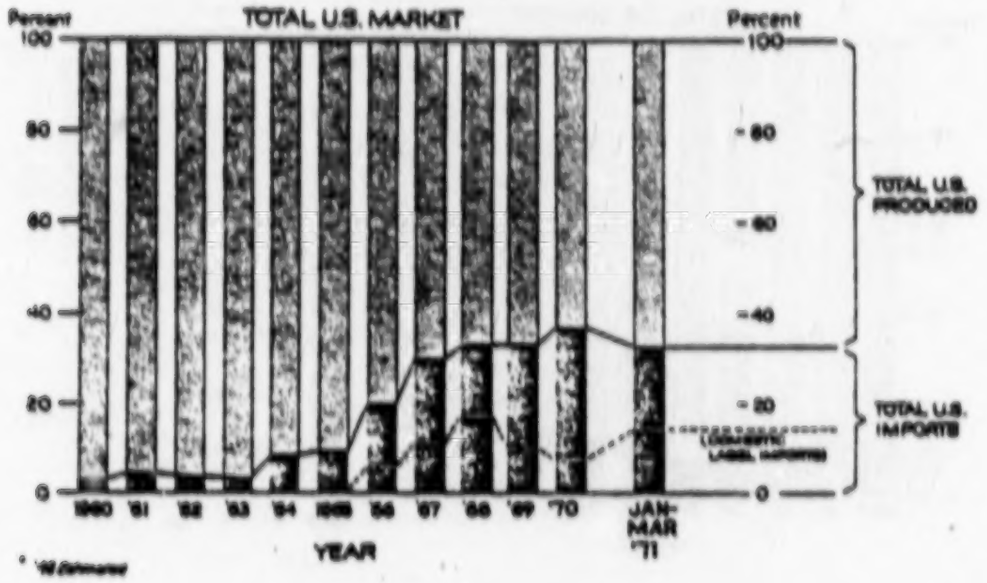
U.S. MARKET FOR TELEVISION - COLOR & B/W - 1960-1970
U.S. PRODUCED VS. IMPORTS AS % OF TOTAL FACTORY PRODUCTION



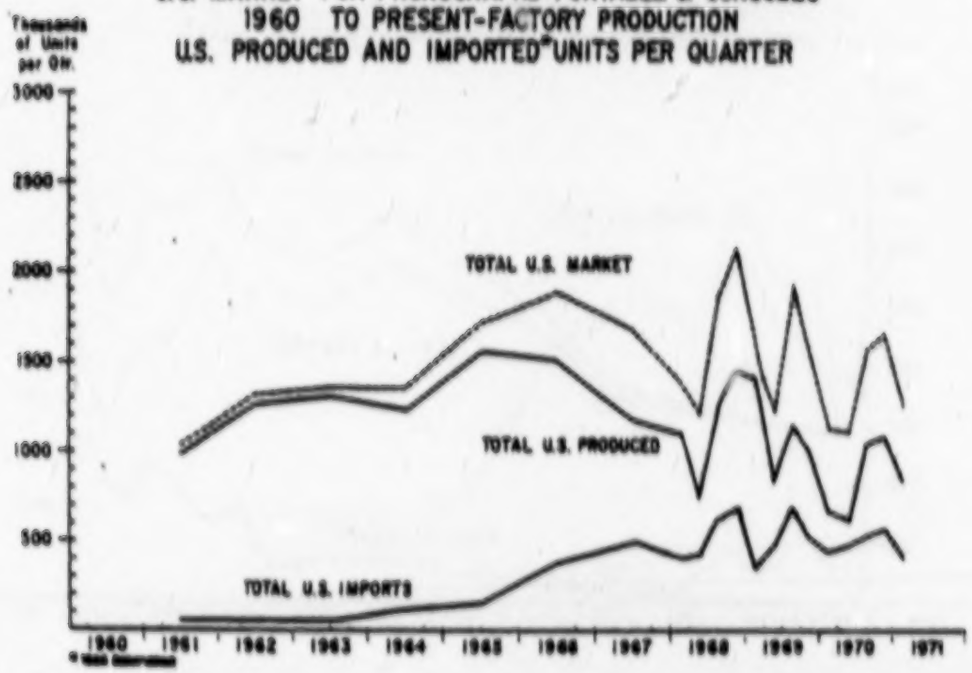
U.S. MARKET FOR TELEVISION - COLOR AND B/W
1960 TO PRESENT-FACTORY PRODUCTION
U.S. PRODUCED AND IMPORTED UNITS PER QUARTER



U.S. MARKET FOR PHONOGRAPHS - PORTABLE & CONSOLE - 1960-1970
U.S. PRODUCED VS. IMPORTS* AS % OF TOTAL FACTORY PRODUCTION

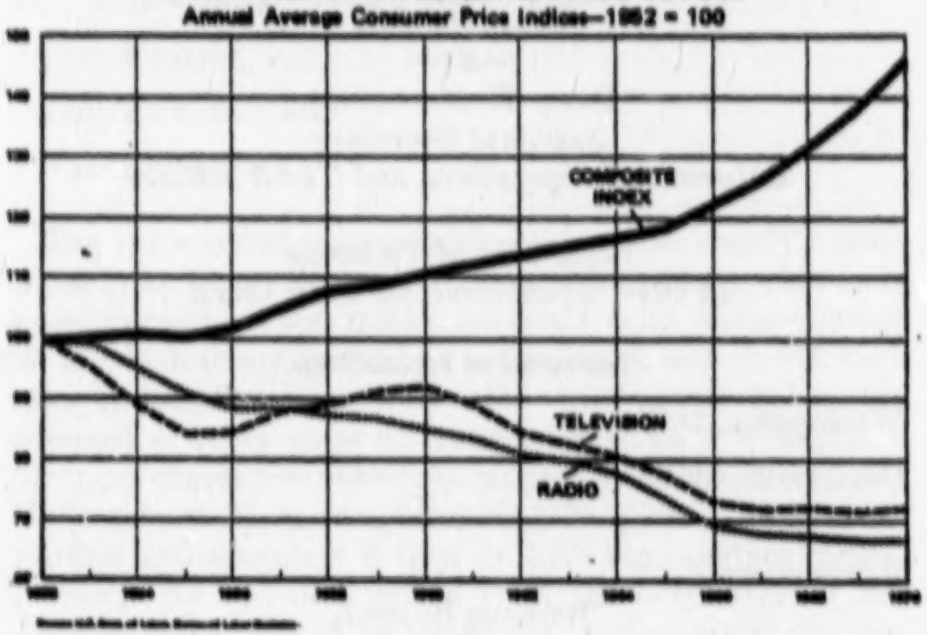


U.S. MARKET FOR PHONOGRAPHS-PORTABLE & CONSOLES
1960 TO PRESENT-FACTORY PRODUCTION
U.S. PRODUCED AND IMPORTED* UNITS PER QUARTER



TRENDS IN RADIO AND TELEVISION CONSUMER PRICES COMPARED WITH GENERAL PRICE LEVELS

Annual Average Consumer Price Indices—1952 = 100



UNITED STATES CUSTOMS COURT

[Exhibit 4 to Plaintiff's Reply Brief and Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment]

UNITED STATES DEPARTMENT OF THE TREASURY
OFFICE OF THE SECRETARY

Press Briefing
—By—
DAVID R. MACDONALD
Assistant Secretary
Enforcement Operations and Tariff Affairs
on
Rejections of Petitions
In Steel Countervailing Duty Cases

Transcript of Proceedings

Washington, D.C.

October 20, 1975

* * * * *

PARTICIPANTS:

RICHARD B. SELF,
Acting Director,
Office of Tariff Affairs

and

MEMBERS OF THE PRESS

[2] Secretary Macdonald: Good morning. My name is David Macdonald. I am Assistant Secretary for Enforcement Operations and Tariff Affairs for the Treasury Department.

To my left is Dick Self, who is Acting Director of the Office of Tariff Affairs.

We are announcing today—as you can see—that we have rejected the petitions of the U.S. Steel Corporation which alleged that the remission of the value-added tax on ex-

ports by seven E.C. Countries constitutes a "bounty" or "grant" within the meaning of the Countervailing Duty Law.

Before I go any further, I think it might be good for those of you, who are not immersed in this subject every day, to just quickly review these terms:

Direct taxes;

Indirect taxes; and

Value-added tax.

The value-added tax can probably be most closely analagized [*sic*] to our State sales taxes. It is an excise tax on a sales transaction but, unlike our State sales taxes—almost all of which to my knowledge are assessed only on the *final* sales transaction to the *consumer*—the value-added tax is assessed at *every stage* of transfer. So that, if a manufacturer purchases raw materials, he pays a tax to his supplier. He then turns those raw materials into a semi- [3] finished product and transfers it then to, let's say, another manufacturer. *He* will then collect from the next stage in the distribution line, a value added tax, taking credit for the prior tax that he has paid, and so on up the line—each stage collecting the tax until, finally, when the final product is sold to the Consumer, the tax is collected by the seller and remitted to the Government.

This tax is, *upon exports, not* collected; and this is the sense of the U.S. Steel petitions—that the distinction between collecting it for Domestic sales and not collecting it for International sales, in effect, conveys a subsidy on exports.

That is the value-added tax.

There is a distinction, in this area, that has been adopted and maintained by the Treasury Department, and that is reflected in the GATT—in our General Agreement on Tar-

iff and Trade—between "direct" taxes and "indirect" taxes.

Direct taxes are those taxes which, theoretically, are imposed directly upon the tax-paying entity, such as an income tax, or Labor/related type taxes like the FICA.

Things like that.

Indirect taxes are assessed on the transaction, such as a sales tax or a commodity excise tax, so that the transaction itself gives rise to the tax.

Now, the GATT provides that the remission of [4] indirect taxes, under certain circumstances—such as occurs here in the value-added tax situation—does not result; it is not to be deemed a subsidy; whereas the remission of direct taxes —that is to say, if we were to forgive corporate income tax, depending upon its exports—then that would, indeed, be deemed to be a subsidy.

The Treasury Department has consistently followed this distinction and has, in the past, countervailed against the remission of *direct* taxes.

Okay! Having made that distinction, I just want to make this additional point: The fact that we have not found the remission of value-added taxes to be a bounty or grant within the meaning of our law, does not mean that the United States Government is wild about other taxes of this sort. In fact, if there was one thing that was quite persuasive in the petition filed by U.S. Steel, it was their economic argument that, *in fact*, there should be no distinction between direct and indirect taxes.

We believe that, while we are making this decision in consonance with our prior precedents—we believe that this is a subject which requires very serious negotiations because the distinction between so-called "direct" taxes and so-called "indirect" taxes, economically speaking, may well be chimerical.

Okay. Any questions?

Member of the Press: What about Court actions of [5] U.S. Steel, which are possible?

I understand that there are two Court decisions—of 1903 and 1907.

Secretary Macdonald: Yes, there are two; correct!

There are two ancient Supreme Court cases—*Nicholas* and *Downs*—in which the Supreme Court stated—this is going back to, I believe, the first and second decades of the 20th Century, in which the Supreme Court stated that the remission of indirect taxes on Russian sugar and of some other product that I cannot think of right now, did, indeed, constitute a bounty or grant.

If the same question were raised before the Supreme Court, *today*, it is our opinion—and this is why we decided the case the way we did—that the Supreme Court would decide the other way, in the light of all of the history and the economic changes that have gone on, up to this time, in a long period of, in essence, acquiescence in the Treasury Department's manner of handling this.

Also, I won't go into the question of whether those Supreme Court cases were holding, or *dicta*. There is some question as to whether these statements *were* holdings, or dicta.

Member of the Press: What is a "dicta"?

Secretary Macdonald: Well, a "holding" is: You say something that is *essential* to your decision.

Then you may go on, in your opinion: "By the way, [6] *this*, also, would be true."

You see what I mean?

That is a *dicta*, and *it* is entitled to less weight—under Anglo-American jurisprudence.

Member of the Press: Is U.S. Steel going to appeal your decision?

If so, which Court would it go into?

Secretary Macdonald: It would go into the Customs' Court.

In answer to your *first* question: I don't *know,* but it would not surprise me.

Member of the Press: Why did Treasury wait so many years to make this decision rather quickly, since they had only gotten the petition a month or so ago; when there is a petition pending since 1968?

Secretary Macdonald: Well, the petition in 1968 was about to be acted upon by the Treasury Department when it was withdrawn.

Member of the Press: Why did it wait so many years? Six or seven years?

Secretary Macdonald. Why did it wait so many years? You have to ask the people who were around the Treasury Department at that time—why they waited so many years. I don't know.

Needless to say, when you have a petition like that [7] pending—we have been addressing ourselves to this issue for a long time—there is also another aspect to this.

This is not, in our view, an entirely novel question. We have had similar questions presented to us not as, perhaps, broadly presented to us as presented in the U.S. Steel case; but we have taken a consistent position in at least three or four cases that I am aware of, since I have been Assistant Secretary.

Member of the Press: After doing this, are you going to make any suggestions to Ambassador Dent on the upcoming negotiations concerning indirect or direct taxes?

Secretary MacDonald: Yes. Ambassador Dent is well aware of this problem, and we participate, internally with him, on questions of where the United States should be going—from a policy standpoint.

Member of the Press: Is the Treasury now tinkering with changing the direct and indirect, and considering it as one?

Secretary Macdonald: I think it is fair to say that the United States Government is in favor of changing it.

Member of the Press: Did the petition that U.S. Steel filed contain any other export subsidy allegations—other than the value-added tax—such as low interest loans or special loans, or Government payments?

Secretary Macdonald: No. It did not.

Member of the Press: Would you confirm reports that [8] you disclosed this decision last week to the European Government?

Secretary Macdonald: Yes. That is confirmed.

We also disclosed it to U.S. Steel.

Member of the Press: Why did you disclose it to the Company and to the Countries without disclosing it publicly, first?

Secretary Macdonald: Well, we felt that we ought to let them know just before we disclosed it to the Public—to see if they had any last minute arguments that we had not dealt with—you know, had not thought of.

Member of the Press: Because U.S. Steel is a publicly owned company, would this not cause problems, perhaps, with "insider information?"

Secretary Macdonald: I had not even thought of that! I had not even thought of that.

Member of the Press: It doesn't look like the stock waivered much during the week, but it seems to me that there is a question there.

Secretary Macdonald: You may be right!

Member of the Press: Does this decision bear in any way—or set any precedent that could relate to the other countervailing decisions which we still have yet to decide upon?

Secretary Macdonald: There are, undoubtedly, other countervailing decisions pending before us which either [9] allege—or might allege—the remission of indirect taxes as a bounty or grant. It is a universal practice, and one in which this Country engages, also!

Our New York State sales tax—or, at least, I know the Illinois State sales tax is remitted on the export of products from Illinois.

I believe, also, excise taxes that we have on alcohol beverages are remitted on exports. They are not assessed by this Country. This is not an uncommon practice.

Member of the Press: The point I am getting to is this: If it is so usual to take this position on a direct tax, then why has U.S. Steel made an issue of the whole thing over again this time?

Secretary Macdonald: Well, I think that they felt—I cannot speak for them and perhaps I should not—but I can only say generally, that whenever you feel that a practice does not comport with the law, there is certainly nothing wrong with urging a different result in the face of all of the precedents that are facing you.

In 1853, Abraham Lincoln was criticized soundly for rejecting the *Dred Scott* decision. He was appealing, presumably, to the wisdom of future generations to correct that decision.

Member of the Press: The point that I am trying to get to, is this:

[10] Isn't it a fact, under the reason why they did it, it is because of the new safeguards provided in the Trade Bill —the Trade Act?

I am wondering whether your decision in this case coupled with the remarks which Ambassador Dent made in Hot Springs in a Business Council last week, don't really mean that the Administration is conspiring to mitigate these events as far as it can in the forum of the M.T.N.?

Secretary Macdonald: Mitigate what events?

Member of the Press: To mitigate the new rights to protection as they are given in the Trade Bill.

Secretary Macdonald: No. I would deny that! I think that it is pretty obvious that that is *not true*!

I am sorry I cannot present you with intrigue, personality conflict, cover-up, scandal, etc., but I am afraid that you will find—in this particular case—that it is a question of your Government operating as best it can to apply law that it finds—having had it handed down to it by the Legislative authority—in the interest of the common weal.

I realize that it does not make good writing, but I think that is the case.

Member of the Press: It remains a fact, surely, still, that demands for protection are running at record level——

Secretary Macdonald: I can't agree with that statement at all! What?

[11] Member of the Press: —following the passage of that Bill.

Secretary Macdonald: It depends on how you define "protection".

Well, I don't find, myself, that the demand to be free of subsidized competition, or price-discriminatory competition, is equivalent to a demand for protection.

Protection, to me, is something other than that—but there is no inconsistancy [*sic*] between Fair Trade and Free Trade.

Member of the Press: Had you found the other way in this case, did you have indications from the EEC Countries on what their reactions might be—in terms of trade barriers?

Secretary Macdonald: Well, we had the usual presentations. Is this what you are saying? The usual presentations made to use through all sources, advising us of all sorts of consequences?

Yes, we have had the usual situation there.

Once again, we just try to decide the cases as we get them.

Member of the Press: Dave, with this particular use out of the way—at least temporarily—there have been recurring reports that a whole bunch of Steel Dumping Cases are going to land on you again.

Can you tell us about that?

[12] Secretary Macdonald: I cannot really give you anything—authoratively [*sic*]. I have not heard anything firsthand.

Member of the Press: You don't have a Steel Dumping Case now?

Secretary Macdonald: No, we do not.

Member of the Press: Is this the first instance of Treasury ruling, precisely, on the European value added tax?

Secretary Macdonald: As far as I am aware, it is. Yes!

Member of the Press: Would you say there are similar decisions on indirect taxes over the years?

Secretary Macdonald: Right!

Member of the Press: Could you give us an example?

Secretary Macdonald: "Mexican Steel"—which is a preliminary decision. It has not been finalized yet—but it gave plenty of warning for this result.

This is also another refutation—I think, Jeff—to your point.

Japanese Electronic Products: The Japanese have a commodity excise tax that was alleged to be a bounty or grant when remitted. It was determined that it was not. That, also, is a preliminary decision, isn't it?

Mr. Self: Yes, it is.

There are two Spanish cases a year ago, that are also at point. We only countervailed the over-rebated [13] internal tax which is an indirect tax. In effect, we ruled that——

Secretary Macdonald: —that the regular rebate—the "non-over" rebate—is not a bounty or grant.

Those two cases were "Spanish Footwear" and "Bottled Olives".

Member of the Press: Are there any Court cases—since the early 20th Century—that go into this question of indirect taxes?

Mr. Self: Yes. The *American Express versus the United States* (case) which involved our countervail against remission under Italian Law 639. We countervailed Steel Products under that law, and the American Express took us to Court on that, and the Court of Customs and Patent Appeals ruled, in effect, in the Treasury'sfavor.

Secretary Macdonald: I was going to say, "on other grounds"——

Mr. Self: "On other grounds"——

Secretary Macdonald: They did not reach that issue.

Mr. Self: But it does cross the Indirect Tax Issue to a certain extent.

Member of the Press: So, if U.S. Steel dcided to go to Court, this would really be, perhaps, the first case since the early 20th Century, where the Indirect Tax question has come into play?

[14] Secretary Macdonald: Except that the Customs Court, itself, in that same case—American Express—addressed itself to the issue.

Member of the Press: Are there other Countries that are outside of the EEC that use value-added taxes?

Secretary Macdonald: I believe so.

Member of the Press: Can you tell me which?

Mr. Self: Brazil does.

Member of the Press: Brazil?

Mr. Self: Yes.

Practically all European Countries have a value-added tax.

Australia has it.

Member of the Press: It is widely used, isn't it?

Mr. Self: Spain has a "turn-over" tax.

Scandinavian Countries have value-added taxes.

Member of the Press: Do you feel a sense of irony at all—that you are rejecting the U.S. Steel petition, yet you agree somewhat with the concept, with the——

Secretary Macdonald: With the economic argument that was made?

Member of the Press: Yes.

Secretary Macdonald: No. I don't feel any irony in that at all. We just try to follow the law.

[15] Member of the Press: Where, and how, Dave, are we going to get the negotiations on this question within GATT—in view of the problems that are already raised?

Secretary Macdonald: I am really not sure, Jack! I think that is a question that might better be addressed to Ambassador Dent.

Member of the Press: In your talks last week with officials of other Countries, did the Auto Dumping situation arise?

Is there anything new on that?

Secretary Macdonald: There is nothing new on it.

Obviously they, again, brought it up to us. And we obviously, again told them that this was an investigation in which our discretion was, really nil!

We just had to make the finding as to a particular fact which is the question of whether there are "sales at less than fair value."

Member of the Press: How does the clock run on that one?

When is your next deadline?

Secretary Macdonald: February 7 is the deadline—unless we extend it by reason of its being a complex case.

Member of the Press: That is to make a decision whether there are, or are not sales at less than fair value?

Secretary Macdonald: Correct!

[16] Member of the Press: You have not held appraisement?

Secretary Macdonald: No, we have not.

Member of the Press: If there is an extension, it will be for three months. Is that right?

Secretary Macdonald: Maximum!

Member of the Press: Would you expect that this would be extended?

Secretary Macdonald: I think it is really too early——

Member of the Press: Is that a decision you make—to extend it?

Secretary Macdonald: Yes.

Member of the Press: Or would the EC have to ask for the extension?

Secretary Macdonald: No! We can make *that* three-month extension ourselves.

There is another three-month extension—not the EC. The Automobile Manufacturers are parties in interest in the dumping case; and they could request a further extension of three months in order to have a Confrontation Conference.

Member of the Press: So it could be, all in all, a maximum of 12 months? Six, plus three, plus——

Secretary Macdonald: Yes. By the time the referral is actually made—over to the International Trade Commission.

[17] Member of the Press: You can't get a body election through the I.T.C.?

Secretary Macdonald: You think about the things that never dawn on me!

Member of the Press: Did you see the decision—by the Volkswagen Company—to change the prices of the Beetles, or, at least curtail the lower priced ones, as a reaction to the investigation?

Secretary Macdonald: I am not even aware of the factual basis of your question, so I really cannot answer the question.

Member of the Press: Could I just ask you: In your press release, it is customary form to say that U.S. Steel has not given enough information and allegations and so on? But you are not really saying that!

Secretary Macdonald: We are not saying that at all! Don't misunderstand. Otherwise, we would have opened an investigation.

Member of the Press: Your second paragraph in the press release says: "Mr. Macdonald said that the action he was announcing *means* that the Department has concluded that the information and allegations contained in the U.S. Steel petitions do not on their face describe a bounty or grant and are therefore insufficient to warrant initiation of formal investigations."

[18] Secretary Macdonald: Correct.

Member of the Press: In effect, what you are saying is much stronger than that! You are saying it is not a bounty or grant—*not* that it is information that U.S. Steel has provided.

Secretary Macdonald: Yes. Okay! Maybe that does require a little—

Member of the Press: Your decision is much broader.

Secretary Macdonald: I stick with that statement.

Member of the Press: It has much broader implications.

Secretary Macdonald: That statement *has* those broad "*implications.*"

Member of the Press: I see.

Secretary Macdonald: We are saying what you just said. We are saying that the facts, as far as we can see, are *undisputed*. We don't need to open an investigation in order to find out new facts. Everybody knows what the facts are! Having had this grounding of facts that everybody agrees upon, we are making a *legal determination*.

Member of the Press: That's right.

Secretary Macdonald: That is *really* what we are saying. That is *what that was intended to say*.

Member of the Press: What was the reaction of the Common Market people when they were informed of this decision?

Secretary Macdonald: Relief!

[19] (Laughter)

Member of the Press: Did they give you any threats?

Secretary Macdonald: There is constant pressure—always—coming in from *all* sides. You just have to get used to a certain noise level when you are in this particular job.

Member of the Press: Did you have Secret Service protection?

(Laughter)

Member of the Press: Thank you, Mr. Secretary.

(Whereupon, the press briefing was concluded.)

UNITED STATES CUSTOMS COURT

[Exhibit 5 to Plaintiff's Reply Brief and Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment]

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

RESTRICTED

Paris, 16th February, 1966

C/WP4(66)4

Scale 6
Or. Engl.

WORKING PARTY NO. 4 OF THE COUNCIL ON BORDER TAX ADJUSTMENTS

The United States Submission on Border Tax Adjustments

The United States Position: The United States Government believes that border tax adjustments cannot automatically be assessed to be trade neutral. Rather, they are almost certain to be export-promoting and import-restricting. We consider the assumption that indirect taxes are reflected in full in the price of products and that direct taxes are not reflected in prices at all to be an extreme one, with a whole range of alternative possibilities more likely.

The conclusion is similar to that of the O.E.C.D. experts on other tax adjustments, who met in September 1964. The experts concluded that the assumption underlying the full shifting of indirect taxes and the zero shifting of direct taxes was not realistic and that full border adjustment therefore is likely to be favourable to the balance of trade. The group of experts also agreed that shifting is more likely to occur in the case of selective excise taxes, such as the traditional revenue excises, than in the case of more general taxes. They also concluded that corporate profits

taxes were partially shifted into product prices, perhaps more so in the United States than in Europe.

The Urgency of the Situation: Whatever effect the present structure of border tax adjustments has on trade flows, the United States Government would be less concerned if it seemed probable that the status and [*sic*] would be maintained. On the contrary, however, we have recently seen significant changes and further changes appear to be in the offing. Illustrative of the prospect of a period of increased activity in the area of border tax adjustments, but by no means the sole example, are changes related to the tax harmonisation plans of the members of the European Economic Community. The German legislature, for instance, is currently considering legislation to replace its general cascade tax system with a tax on value added system.

It is important to emphasise that the United States is concerned *only* with the border tax adjustments and not with the tax harmonisation process as such. The first stage in the harmonisation of tax systems is likely to lead to an increase in the border tax adjustments of several of the E.E.C. countries because the present system employed in these countries (the cascade system) does not result in rebating or compensating for the full amount of the domestic tax levied on the product. It is universally agreed that upward movements in border tax adjustments, if unaccompanied by an increase in the actual internal tax burden, will confer trade benefits on the country making these changes.

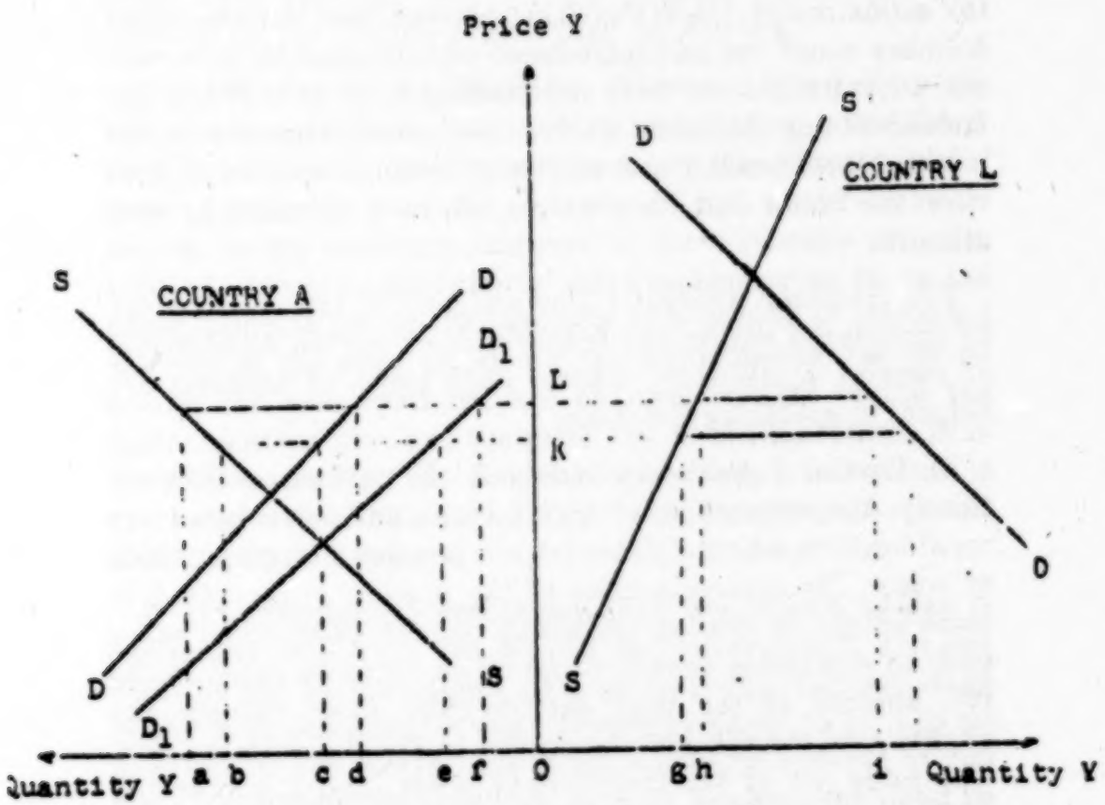
If the E.E.C. subsequently moves to a harmonisation of tax rates, application of present practices will result in further changes in border tax rates. To the extent that increases in tax rates were not fully reflected in prices, such upward movements in border tax adjustments would act as a subsidy on exports and an additional tariff on imports.

The Secretariat study of recent developments on border tax adjustments [C/WP4(65)2] showed that various other Member countries had introduced or increased their border tax adjustments, or were considering to do so. While the United States Government does not pass judgment on the internal justification and merits of these measures, it does view the trend and its possible future repercussions with concern.

Tax Shifting Analysis: The analysis of tax shifting can be considered within the framework of partial equilibrium of general equilibrium theory. Both types of analysis are helpful in assessing the issue.

A. *Partial Equilibrium Analysis:* In partial equilibrium theory, the imposition of excise taxes and sales taxes are considered to be no different from increases in other kinds of costs. The domestic price of the product is increased to some extent by the tax (although only in exceptional cases such as cigarettes does it verge on an increase equal to the full amount of the tax) and in most cases reduces the quantity of the product demanded in the domestic market. The price *net of tax* therefore is lower, and a border tax adjustment involving a full refund of the tax to the exporter makes export sales relatively more profitable than before, thereby acting as an incentive to export the taxed commodity.

The following diagram illustrates more precisely the mechanics of the export-promoting effects of a tax. The import-inhibiting effect of border tax adjustments is not illustrated but can be demonstrated along similar lines.



The SS and DD curves indicate the supply and demand curves for a product Y produced, consumed and exported from country A and produced, consumed and imported into country B. The demand and supply curves in countries A and B have been drawn with elasticities approximately equal to 1 in the relevant area. The quantity is measured along the horizontal axis, from O to the left for country A and from O to the right for country B. Price is measured on the vertical axis and since exchange rates are assumed to remain fixed can be measured either in terms of A's or B's currency unit. Prior to the imposition of the tax country A produced Oa of Y. At the equilibrium price of Ol the market was cleared with domestic consumers buying Od

and consumers in country B (which can be considered to be the rest of the world) importing da which together with a production in B of Oh satisfied demand there of Oi (i.e., da = hi). With the imposition of a tax, domestic demand in A net of tax shifts to D_1D_1, the vertical distance between D_1D_1 and DD representing the tax payable per unit bought at various prices. The tax has no effect on supply or demand in country B since it is not collected (or is rebated) on A's export transactions. At a net of tax price of OL consumers in A are no longer willing to buy Od units now that they have to pay a tax in addition to that price. Instead they are willing to buy only Of units at that price, leaving an excess supply of fd. The excess supply causes prices to drop until supply (in both A and B) decreases sufficiently and demand (again in both A and B) increases sufficiently to again be in equilibrium. In the model the price drops to K. Country A now produces Ob, consumes Oe and exports eb of Y. Country B consumes Oj, produces Og and imports gj (which is equal to eb). As a result of the tax (and the fact that it was not levied or was refunded for exports) A's exports have increased by (ed − ba) which is equal to the increase of B's import by (gh + ij).

With respect to direct taxes, in particular the corporate profits tax, partial equilibrium analysis is also pertinent. The traditional argument is that producers do not shift the tax forward and do not affect the price paid by the consumer. This is so because producers are assumed to maximise their profits, i.e., produce at the point where the marginal revenue equals marginal costs. Both before- and after-tax profits will be maximised at this point. No matter what part of the profits are taxed away, the producer must first maximise before tax profits; this can only be done at the point MR = MC.

However, it is realistic to modify the assumption that firms maximise profits at all times for every product in the every day business world. There seems to be consider-

able evidence that many firms follow average cost pricing rather than trying to equate marginal revenue and marginal cost. For one important thing, firms usually have only an imprecise idea of the shape of the demand curve facing them and therefore have difficulty calculating marginal revenue. Under these circumstances, firms in some industries as a matter of practice set their price to cover average cost at some "standard volume" (i.e. what they estimate they are likely to sell over a given period, the estimation often being based on factors other than price) and to include a profit after taxes which is considered "normal" for the business. The profits tax thus becomes one of the costs included in the price. In other words, where it is possible to pass on the so-called direct taxes, in particular the profits tax, the entrepreneur will do so to the extent that the market permits.

B. *General Equilibrium Analysis:* While the above analysis is appropriate in dealing with selective excise taxes, examination of the effects of a general tax, falling on all or most of the output of an economy, requires consideration of the *aggregate* impact of the actions of individual firms. Theoretically there exists a wide range of possible results of the imposition of a general turnover tax. At the one extreme is the case where all prices rise by the full amount of the amount of the tax, output remains the same, border taxes are adjusted upward by the full amount of the tax, and the level of exports and imports also remains unchanged. This is the assumption underlying the claim for the neutrality of border taxes. At the other extreme is the case where the imposition of the tax does not occasion any increase in prices, border taxes are increased by the full amount of the tax, and the trade balance is improved. The extent of the resulting factor unemployment and the degree of improvement in the trade balance will be dependent on the degree of downward flexibility of factor prices and on elasticities of supply of and demand for imports and foreign supply of and demand for exports.

In the world of static general equilibrium analysis, with productivity held constant, the insertion of the sales tax "wedge" between factor returns and market price must inevitably result in increased product prices and/or decreased factor returns. Once productivity increases are introduced, however, there exists the possibility of accommodating the tax "wedge" without forcing product prices up, or factor prices down, or increasing unemployment.

This is not to suggest that the various elements could normally be expected to balance out so neatly that the introduction of a general turnover tax would exert absolutely no upward pressure on prices. But it does suggest that a significant portion of a sales tax could be absorbed by factors of production through increases in productivity.

Although in the long-run prices must cover all costs, not every increase in costs results in an increase in price. Given all the forces which play on price over time, it is not at all clear what the result will be of one single action such as the imposition of a general turnover tax. The state of aggregate demand will crucially affect the extent of tax shifting, and the response of aggregate demand to the tax is both unpredictable and heavily subject to the influence of government policy instruments. Moreover, as the various forces play themselves out over time, any pressure exerted against the upward movement of prices by a sluggishness in the rise of aggregate demand will, given full border tax adjustments, make export sales more profitable and cut into foreign exchange expenditures for imports. The very improvement of the trade balance occasioned by these circumstances will, in turn, increase domestic production and thereby reduce the pressure on government to follow expansionary domestic policies in order to avoid or reduce unemployment.

In summary, an examination of the shifting of a general turnover tax in a dynamic general equilibrium setting leads to the conclusion that a wide range of outcomes are real

possibilities. There is no *a priori* reason to assume that full or nearly full forward-shifting is the normal expectation and the burden of proof rests on those who assert that such is the case. The conclusion is that present border tax adjustment practices, the economic justification for which rests on this assumption, are arbitrary and not normally likely to be trade-neutral.

How General Are Turnover Taxes?: There is also a problem related to the generality of turnover taxes. Available information suggests that in many existing turnover tax systems there are significant areas of value output, particularly services, which are either not taxes or are taxed at a lower than average rate. To the extent this is so, expenditures are guided into the non-taxed areas. Where these non-taxed areas are objects of expenditure which do not normally enter into international trade, as services are, the effect will be export-promoting and import-inhibiting.

The United States therefore believes that this facet of the border tax problem merits further investigation and would welcome the views of those countries which now have turnover tax systems as to their generality and their effect on trade.

Other Reasons for Questioning Border Tax Adjustments: In a general equilibrium situation there are many government actions which affect prices other than changes in indirect taxes. A number of these have been previously mentioned by the United States member of the working party, such as government price support programmes, minimum wage laws, social insurance systems, immigration laws, etc. Why should there be adjustments for an indirect tax and not for some of these measures? The argument generally

put forward is that there is no way of measuring the impact of these particular kinds of factors on prices. As we have previously indicated there is also no way of determining the effect of a general indirect tax on the price of products in a general equilibrium situation. Thus we come down to a difference in the relative degree of indeterminateness. This is an argument to which no answer can be found, since the state of present day empirical statistical knowledge is such that we could not accurately determine the effect of these different elements on prices.

Apart from this particular irrationality, there is another one—that of neutralising the trade effects of fiscal measures on the revenue side but not on the expenditure side. If government expenditures reduce business costs, then it would seem equally logical to make adjustments for this kind of expenditure if we are really to seek to "neutralise" the trade effects of these fiscal measures.

In sum, the whole idea of trying to achieve tax "neutrality" in international trade is a highly questionable one. "Neutralisation" of certain kinds of taxes by border tax adjustments and "non-neutralisation" of those government expenditures associated with these taxes result in discrimination against those countries which have a lower level of government expenditures that reduce business costs. The United States probably falls in the latter category. The United States also relies to a lesser extent on those kinds of taxes for which border tax adjustments can be made under present international rules. The present system thus tends to discriminate against the United States to some extent. However, much of this discrimination may have been offset in large part over many years by adjustments in exchange rates, differential rates of inflation, and by other economic factors. This is a strong argument for continuing the status quo of the existing level of border tax adjustments. The United States Government is thus seriously concerned mainly with the trade effects of future changes in border tax adjustments.

Conclusions: The United States would therefore like to reach agreement with the other members of the O.E.C.D. that the full use of border tax adjustments permissible under current interpretations of international rules is not necessarily trade-neutral. Permissible changes in border tax adjustments therefore should not necessarily be made automatically with every change in domestic taxes. Rather, they should be subject to additional policy considerations. How such additional considerations can be brought to bear is one of the problems the United States would like to explore further in the working party.

Annexes: The following annexes contain specific responses in detail to questions raised by the United Kingdom, German, French, and E.E.C. members in submissions previously made to the working party on border tax adjustments.

Annex I

United States Comments on the Note by the United Kingdom Member of the Working Party on Border Adjustments [C/WP4(65)9]

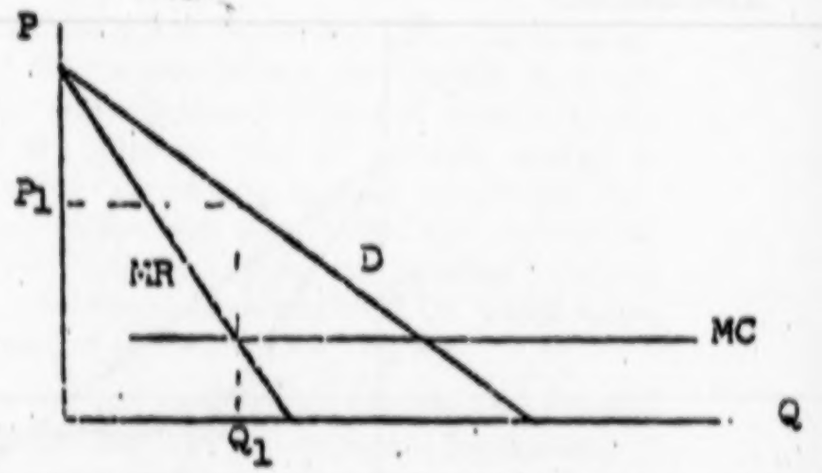
The United Kingdom paper suggests that constant and even declining costs may be more the rule in the long-run than increasing costs. This strikes us as a reasonable working hypothesis, if as appears to be the implication of the phrase, "through economies in production methods" (paragraph 11), it is assumed that technology is improved as production facilities are expanded. Constant and declining costs are then identified in the United Kingdom paper with horizontal and negatively-sloped supply curves respectively, and these in turn are shifted upward to illustrate the impact on cost of the imposition of a sales tax. The results are immediately obvious in diagrams B and C: full and greater-than-full forward shifting of the tax respectively.

Remaining for a moment within the realm of static two-variable analysis, objection must be raised to the easy

identification of cost curves and supply curves. Although they coincide in cases of perfect competition, general recognition of the predominance of various forms of imperfect competition would seem to suggest this as the more appropriate framework for the present analysis. Further we fail to see a theoretical justification for a *short-term* upward shift (paragraph 17) in a *long-term* supply curve, since we understand the latter to be defined only for a period sufficiently long for installation of new production facilities.

Although we share the reluctance of our British colleagues to press too far into economic theory (paragraph 8), several points regarding short-term shifting might usefully be illustrated by resort to a diagram slightly more elaborate than the supply-demand graphs discussed above.

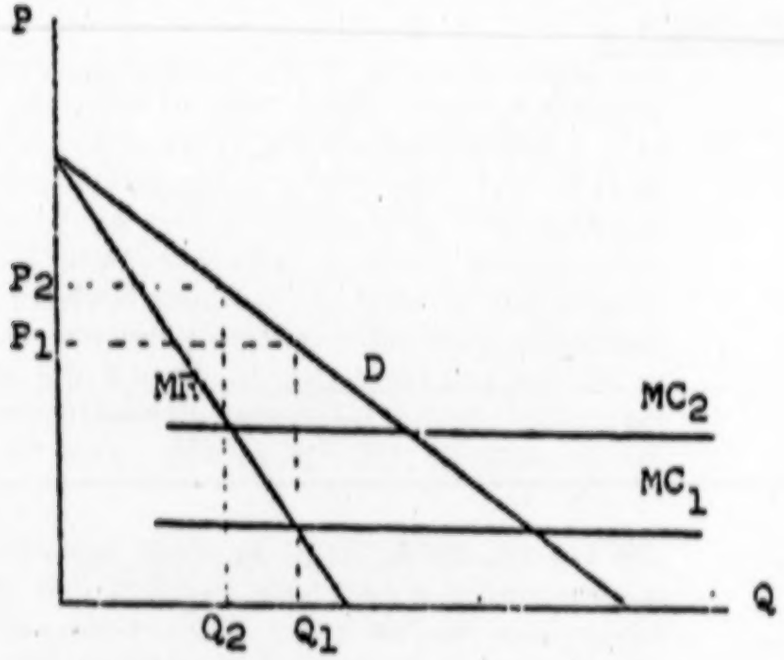
DIAGRAM A



The perfectly flat marginal cost curve (MC_1) indicates that constant marginal costs to the firm have been assumed in this case, but downward sloping demand and marginal revenue curves, the latter being appropriate to the various forms of imperfect competition. Although constant short-run marginal costs may not be an appropriate assumption if the firm is operating near capacity, this assumption helps to demonstrate that our results are not dependent on the

existence of increasing marginal costs. Making, for the time-being, the traditional profit maximisation assumption, it can be seen that the equilibrium price and quantity are P_1 and Q_1 respectively. The fact that the point on the firm's supply curve defined by the co-ordinates P_1 and Q_1 lies considerably above the marginal cost curve is consistent with the traditional tenet that firms in less than perfect markets are able to set price and output so as to maximise net revenue rather than having to accept a given market price which only covers cost. The following diagram is identical to that above, with the addition of a new marginal cost curve (MC_2) reflecting the imposition of a sales tax, the vertical distance between MC_1 and MC_2 being equal to the full amount of the tax.

DIAGRAM 3



The imposition of the tax and the consequent upward shift of the marginal cost curve dictates a new short-term

equilibrium price and output combination denated by P_2 and Q_2 respectively. It will be seen that the price rise in this instance is *half* the amount of the tax, reflecting the shape of the demand curve and the assumption of constant marginal costs. Thus the traditional analysis gives us no grounds for automatically assuming full forward-shifting.

Despite the graphic analysis above it must be conceded that the horizontal supply curve of the United Kingdom paper has some intuitive appeal even for the short-run. In fact both our experience and empirical studies tell us that firms sometimes react to changing market and cost conditions by adjusting production while maintaining the same price, i.e. businessmen are not always short-term profit maximisers in the strict sense defined by two-variable graphic analysis.

Given the difficulties a firm encounters in trying to ascertain the demand for its product over any significant range of prices and for any significant period of time, it is not surprising that the greatest part of business energy is devoted to non-price competition such as advertising, improvements in production and distribution and the myriad of other activities which come under the heading "Ceteris paribus" in the traditional price analysis, i.e. which cause shifts in the demand or cost curves.

While this has obvious implications for our own graphic analysis above, it also has crucial significance for the central United Kingdom assumption of a short-term upward shift in the supply curve, described as the "primary effect" of the imposition of a sales tax. In fact, in the absence of *a priori* reasons for judging what business reaction will be, there is a certain element of gratuity in postulating *any* immediate forward shift in the tax; must [*sic*] less is there ground for the assertion that full forward shifting is the rule.

Nor do we believe the excerpt from the Richardson Committee Report, quoted in the United Kingdom paper, lends

much support for this assertion. The testimony selected from the Richardson Committee Report that "a value-added tax would be regarded as a charge or cost and . . . businesses would *aim* to recover it in prices, either immediately *or on the next review of costs and prices*" (underlining added) is consistent with our own notion of business behaviour. We note that even this excerpt cannot be regarded as unequivocal evidence in favour of immediate, full forward-shifting of such taxes. Other portions of the Richardson Committee Report make the conditional aspect of such business decisions more explicit:

> "It would, for example, be difficult to say to an operating company making a low return that it should not increase that return by raising prices *if it thought it successfully could.*" (paragraph 269, underlining added)

> "The main qualification which witnesses made was the extent to which in some cases *competition might restrict their ability to recover a value-added tax in their prices.* But this did not alter their view of it as a cost they would aim at recovering. One company group, whose view was typical of others, put the qualification in the following way. In time of recession, it might not be possible to recover the value-added tax, but this was also true of other costs: *it was possible to recover them completely only to the extent that market conditions allowed.*" (paragraph 271, underlining added)

> "Reviewing the whole of our evidence, we are left in no doubt that although competition might in some cases restrain prices from rising and although there have been some indications recently of a changed attitude towards pricing policy and of increased resistance to price rises from buyers. The effect of the substitution would be that prices in general would rise and

> that this rise *might* quickly represent a *substantial part* of the value-added tax." (paragraph 272, underlining added).

Thus while business testimony to the Richardson Committee clearly indicates that the firms concerned would like to pass forward any new sales tax which might be imposed, it agrees that success in doing so will depend on market conditions, i.e. on the state of demand; moreover it does not lend any backing to a neat division between primary (immediate) and secondary (long-term) effects.

The influence of competition in holding down the forward-shifting of a sales tax is discussed at several points in the Richardson Committee Report, but usually exclusively in terms of the availability of substitutes for the taxed products. (For this reason, selective excises are usually imposed only on products with very inelastic demands, e.g. tobacco). The conclusion is drawn that a *general* sales or turnover tax, because it falls on all or most products, will relieve firms of anxiety they might otherwise have about raising prices to cover the costs of the tax. This conclusion ignores the fact that, within a given money income, *all* objects of income allocation are to some extent in competition with one another, and that if all prices rise, the same money income will not command the same volume of goods. Put another way, if all firms raise their prices by the amount of the tax and on the average continue to sell the same quantity, total money expenditures must have increased by the amount of revenue generated by the tax, i.e. aggregate money demand in the economy has shifted to the right. It is this implicit assumption in the arguments that general turnover taxes are fully shifted forward that we believe is particularly deserving of close examination.

The only reference to the role of aggregate demand which we have noted in the Richardson Committee's business testimony is the allusion quoted above to market conditions during a recession. Moreover it is possible for an

outsider reading the report to gather the impression that the entire consideration of forward-shifting and the effect on the trade balance took place without reference to the role of governmental monetary and fiscal policy in influencing the level of domestic aggregate demand. The implicit assumption seems to have been that monetary policy would be geared to accommodate full shifting. If so, the conclusions were largely pre-determined by this initial assumption.

If the assumption of easy monetary and fiscal policies in the face of a tax-induced rise in prices is a valid one, then the argument in favour of full forward-shifting gains considerable strength. However, we question its validity. Given the fact that an officially-sanctioned round of price increases, supported by an expensive monetary policy, would be highly susceptible to triggering further upward adjustments, and that the entire process could not help but generate severe pressure for wage increases, we find it difficult to envision responsible monetary and fiscal authorities adopting a passive attitude. (Moreover, to the extent that monetary-fiscal policy is conducive to full forward-shifting of sales taxes, it is also conducive to forward-shifting of other taxes on business, including profits taxes).

The outcome of such a process is not readily predictable. It is clear that to the extent the newly-imposed tax is not fully shifted forward into prices, while full border tax adjustments are made, export sales become more profitable relative to domestic sales than they would otherwise be. Further, imports are disadvantaged since foreign exporters either absorb part of the compensation tax in order to maintain sales (this in itself would reduce foreign exchange expenditure, thereby improving the trade balance of the country imposing the border tax), or sell at a higher price relative to competing domestic goods, thus reducing sales. The new equilibrium toward which import and export volumes tend depends, as in the traditional analysis of a devaluation, on the elasticities involved. Tying up this package with a Keynesian ribbon, it will be noted that the

increase in production of exports and import-competing goods tends to take the employment slack out of the economy which would otherwise be caused by the restrictive monetary and fiscal policy, resulting in an improved trade balance with a higher level of real savings.

It may be argued that the above picture is as open to the objection of gratuity as is the assumption of full-forward shifting. Perhaps this is so. But a central element of the United States view on border tax adjustments is that precisely because *a priori* judgments regarding the effect on prices of general sales or turnover taxes are so difficult, and the outcome so heavily subject to the influence of policy instruments, changes in border tax adjustments should not be governed entirely by an automatic rule with an extreme built-in assumption but should be additionally evaluated in the light of their trade impact.

Annex 2

United States Comments on Remarks Made by the German Member of the Working Party on Border Tax Adjustment at the 3rd Session on 20th September, 1965 [C/WP4(65)7]

The German member divided his remarks into three parts. In Part I he asserted that numerous government measures, in addition to indirect tax laws, influenced prices and, therefore, international competition. He went on to argue, however, that border taxes could not be dispensed with unless tax laws were harmonised.

In Part II of his presentation the German member examined the justification of border tax adjustments in light of existing tax structures. He noted that indirect taxes were reflected in full in cost accounting, and, therefore, more readily and fully shifted forward than other taxes.

In Part III the German member indicated that a complete system of multilateral control of border tax changes

would be impracticable. He also asserted that the motive for the planned change in the Federal Republic's tax system was the achievement of tax neutrality in domestic competition.

The United States agrees with the remark that "a number of government measures, besides indirect taxes, have an influence on prices and thus on international competition". The question arises, therefore, why indirect taxes, alone of all these measures, are automatically compensated for through border adjustments. The German member did not address himself to this fundamental question. What is the logical basis, in other words of adjusting at the border for taxes but not for other government measures which affect prices? It may also be relevant to point out in connection with this remark that arrangements have been made within the Trade Committee for prior consultation on certain measures influencing international competition so that the external effects can be adequately taken into consideration.

In examining existing tax structures the German member pointed out that the burden imposed by "direct" taxes in the various countries might not differ very much. The United States agrees with his conclusion that no need for border adjustments for direct taxes would exist if the direct tax burden and the degree of tax shifting in all countries were equal. However, it feels that further examination of the underlying assumption regarding the equality of direct tax burdens is warranted. Differences in the schedules of corporate tax rates do exist among the O.E.C.D. countries, and *effective* tax rates, which are the relevant ones for our purposes, may show greater disparities.

The German member's statement as to the close connection between cost accounting and indirect taxes neglects to consider the conditions of supply and demand in a partial equilibrium setting, or government fiscal and monetary policies in a general equilibrium setting. In a partial equi-

librium analysis the effect on prices of a tax on a single good will be influenced by the shape of the relevant supply and demand curves regardless of the "relative proximity of 'indirect taxes' to the costing process". The United Kingdom member acknowledged this point in his remarks. When a general excise tax is involved, the effect on prices should be analysed in a general equilibrium framework. The assumptions that are made regarding government fiscal and monetary policy, including the official incomes policy, will obviously affect the outcome.

The United States agrees that general excises may be imposed at varying rates and that the distinction between general and selective excises may not always be clear. In most cases, however, it is feasible to distinguish between high tax rates on a few items and relatively low rates on a great number of goods and services. In this connection a broad-based excise tax with varying rates may be considered partly general and partly selective: it may be a general excise tax at the lower rate applicable to all items and a selective excise tax at the higher rate or rates imposed on only a portion of the items.

The remarks of the German member regarding the impracticability of "a system of multilateral coatrol [*sic*]" over border adjustment seems to be based on a misunderstanding. A standstill agreement on border tax adjustments would not impede countries from changing their domestic tax laws as they saw fit. It would require only that changes in border tax adjustments attributable to new internal tax legislation be determined separately on the basis of policy considerations. This type of arrangement could be "seriously contemplated" by the United States.

The assumption underlying the German member's concluding remarks is that indirect taxes are fully shifted forward. If one agrees with this premise, then it may be true that "border adjustments serve tax neutrality purposes and not trade policy considerations". However, for the

reasons cited elsewhere the United States rejects the assumption that all indirect taxes are fully shifted into prices and no direct taxes are so shifted. Therefore, it maintains that border adjustments may serve trade policy considerations even though tax neutrality may be a major motivating force for initiating such adjustments.

Moreover, the fact that turnover taxes are not likely to be completely general, i.e., are not usually levied at the same effective rate on all value output of the economy, introduces an additional reason for affirming that border tax adjustments are not trade neutral. Since indirect taxes are frequently levied at a lower rate or not at all on services and other important components of national output not normally entering international trade, there is likely to be a favourable effect on a country's balance of payments. This arises from the price effect since domestic consumers may buy less of the taxed goods and more of the non-taxed items thus reducing imports and promoting exports.

In conclusion, the United States would like to refer to the planned change in the Federal Republic from a cascade tax to a value-added tax. The United States has no reason to question the German member's statement that the decisive motive for implementing the turnover tax reform was to achieve tax neutrality in domestic competition. We do not see, however, why changes in the general level of border tax adjustments, in addition to the internal tax changes, are essential to achieving this neutrality. Moreover, we are not convinced that the trade impact of the border tax changes should be ignored simply because this result was not the motive for the changes. Therefore, we welcome the recognition by the German member that there will be a trade effect which "will depend on whether and to what extent the Federal Republic of Germany will have availed herself of all the possibilities for making the adjustments allowed under international conventions".

Annex 3

United States Comments on the Personal Statement by the French Delegate on Border Tax Adjustments in Connection With the Value Added Tax [CWP4(65)10]

The French submission appears to admit that full forward-shifting of a general indirect tax does not necessarily take place, but given the nature of the value added tax (V.A.T.) and the limited opportunities for substitution by the consumer, full forward-shifting is the most plausible hypothesis.

However, any general price rise occasioned by full forward-shifting must be accommodated by monetary and fiscal policy. This accommodation will depend in large part on the general inflationary or deflationary situation in the economy as the authorities see it. European economies have been for some time and are today, with but one or two temporary exceptions, fully employed. It therefore seems unlikely that monetary-fiscal policy in Europe has provided in the recent past or would provide at this time the ease necessary to accommodate price rise associated with full forward-shifting. Furthermore, the policy goals of O.E.C.D. members to maintain full employment and steady growth in the context of stable prices and balance of payments equilibrium would additionally argue against the easy monetary-fiscal policy assumption underlying and necessary to the thesis of a complete forward shift of a V.A.T.

The French submission argues that the question whether full compensation for a value added tax on exports is justified can be raised only with reference to the period immediately following the introduction of the tax, since over time price structures will be influenced by other factors and it will be "arbitrary and misleading" to try to isolate the influence due to the introduction of a V.A.T. This restrictive proviso ignores the fact that the introduction of a

V.A.T., as does any adjustment in factors affecting the ultimate price of products to a consumer, e.g. changes in wages, changes in import prices, changes in the degree of competition, etc., takes time to work its way through the economy.

Annex 4

United States Comments on the Statement on Border Tax Adjustment by the Fiscal Expert of the E.E.C. Commission [C/WP4(65)8]

The United States maintains that the present system of border tax adjustment is not necessarily trade neutral, i.e. the full use of all compensating adjustment allowed by the present system will not necessarily result in neutralising the effect of differing national tax systems on the international competitive position of national industries. Except under very special circumstances under which the domestic tax is fully shifted forward, the border adjustments allowed by the present rules for some indirect taxes are not equal to the effect of these taxes on domestic prices. The present system does not even attempt to make adjustments for the effect on national competitive positions of direct taxes or for the use by governments of tax revenues (for example, for subsidising national transportation systems, etc.). The increases in border tax adjustments which countries are permitted to make when they increase those indirect taxes for which full border adjustments can be made under the present rules, thus do not necessarily neutralize the effect of the domestic tax change on their international competitive position, but instead may be export-promoting and import-inhibiting. The E.E.C. paper argues that as long as the border adjustment is no larger than the nominal rate of domestic tax for which it is made it cannot be equated to a subsidy. We do not want to enter into a dispute on terminology on this point. What is important is that, unless that tax is fully shifted forward, a full border adjustment will be export-promoting. The economics of the export-promoting effect of a tax are illustrated and explained in detail in the United States Submission, pages 2 and 3.

Even in the unlikely event that an indirect tax is fully shifted forward, an accompanying increase in border adjustment still will be export-promoting if the increase in indirect taxes for which it is made is offset by a decrease in direct taxes some of which had been shifted forward or by an increase in government expenditures some or all of which may reduce business costs. This latter case can be illustrated by the example of a government increasing indirect taxes and using the receipts to subsidise freight rates. The net effect on export prices (before border adjustments) of higher tax rates and lower freight rates might be zero, favourable or unfavourable. But nevertheless, under the present system the exporter would be automatically entitled to an increase in the border adjustment by the full amount of the tax-rate increase.

The E.E.C. paper does not deal in any detail with the question of tax-shifting, but questions whether the United States argument does not depend on the somewhat unlikely assumption of perfect competition. As we illustrate in our comments on the United Kingdom paper, it does not. It might in addition be pointed out that under conditions other than perfect competition the forward-shifting of direct taxes and particularly of the corporate profits tax is also likely to increase.

The E.E.C. paper concentrates on questions of fiscal equity and correctness. We recognise that fiscal correctness is important in assuring that, under the present system, the export-promoting effect will not be further intensified by allowing border adjustments in excess of the nominal rates of the domestic taxes involved. But we fail to see what considerations of equity will be served by insuring that domestic and foreign goods bear the same

"fiscal" burden of indirect taxes. What matters for their relative competitive position surely is the "economic" burden, i.e. the *actual effect on their price* of both all of the taxes—direct and indirect—that have been paid by those producing and consuming them and of the government activities that have been financed with the proceeds of these taxes. This economic effect depends on the extent to which various taxes—in a general equilibrium framework—are shifted forward and backward. The E.E.C. paper side-steps this problem by instead concentrating on what it calls the fiscal effect—which is equivalent to the full economic effect only if it is assumed that all direct taxes are fully shifted backward and all indirect taxes are fully shifted forward. We consider this to be highly unlikely.

Regarding the last paragraph of the E.E.C. paper, we would like to emphasise that the United States proposal to jointly examine and consider the question of border tax adjustments in the O.E.C.D. is in no way intended to "arrest the development of fiscal law and prevent several countries from carrying out the reforms and harmonisation needed in the interest of tax policy."

UNITED STATES CUSTOMS COURT

[Exhibit 6 to Plaintiff's Reply Brief and Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment]

Tariffs and Trade

Speaker: THE HON. JOHN R. PETTY*
Assistant Secretary for International Affairs,
United States Treasury Department, Washington

BORDER TAX ADJUSTMENTS AND GATT

Introducing my subject has been made immeasurably easier as a result of a recent article in the September-October issue of *The Canadian Tax Journal.*[1] Mr. Robert Latimer, the author, has done an admirable job in defining "The Border Tax Adjustment Question", and lucidly pointing up the issues. His article provides an added timeliness to the need I see for a discussion of this subject.

At the outset, let me say that the importance the United States attaches to the issue of border tax adjustments was signaled by President Johnson in his 1968 New Year's Day Balance of Payments Message, when he declared:

> In the Kennedy Round, we climaxed three decades of intensive effort to achieve the greatest reduction in tariff barriers in all the history of trade negotiations. Trade liberalization remains the basic policy of the United States.
>
> We must now look beyond the great success of the Kennedy Round to the problems of non-tariff barriers that pose a continued threat to the growth of world trade and to our competitive position.

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* Although Mr. Petty was unable to attend the conference, the paper which he had prepared was submitted for inclusion in the Conference Report.

[1] Robert Latimer, "The Border Tax Adjustment Question" *The Canadian Tax Journal* (September-October 1968).

American commerce is at a disadvantage because of the tax system of some of our trading partners. Some nations give across-the-board rebates on exports which leave their port and impose special border tax charges on our goods entering their country.

International rules govern these special taxes under the General Agreement on Tariffs and Trade. These rules must be adjusted to expand international trade further.

I believe it would be useful to provide the background for this passage. First, let me review the history of the border tax adjustment problem, and then go on to bring this subject up to date by discussing the multilateral negotiations now under way in GATT.

Background

The General Agreement on Tariffs and Trade was intended to institutionalize the system of international trade, much as the International Monetary Fund was designed to provide rules and order to the international financial system. Both sprang from the desp[illegible] of war and the hopes kindled by the prospects of peace. Each has made a substantial contribution to economic growth, trade and prosperity that exceeded expectations.

However, the world of 1968 is a different world than that of 1946. New demands are now being made of these tried institutions and some are being met. We are now in the process, for instance, of amending the articles of the IMF to make provision for Special Drawing Rights which will better meet the international monetary needs of the future. A fresh look at GATT is called for, too.

Highest on the priority list for this fresh look are those provisions pertaining to border taxes. The problem, in brief, is that GATT permits member countries to provide

a full rebate for *indirect* taxes levied on their exports and to impose equivalent border taxes on imports. On the other hand, GATT prohibits any rebate or import levy for *direct* taxes.

The basic premise underlying these provisions is now being widely questioned. At one time, theorists argued that the burden or incidence of indirect taxes was *entirely* passed on to consumers, while direct taxes were *wholly* absorbed by producers. The GATT rules reflect this supposition. However, it is increasingly recognized today that this is not the case in actual practice and that as a result the border tax adjustment rules of GATT bestow trading advantages on countries which employ multi-stage indirect taxes.

History

The provisions in GATT relevant to border taxes, basically Articles II, III and XVI, are drawn from the Havana Charter of the 1940's which was intended to found the International Trade Organization. These provisions were themselves either a compromise (for example, Article XVI) or were adapted from provisions of numerous bilateral trade treaties, including especially the U.S.-Canada reciprocal trade agreement of the mid-thirties.[2] There is no unified section of GATT which deals exclusively with border taxes and it is quite clear that the provisions of GATT which cover border tax adjustments were not the product of a carefully reasoned theory, or of experience molded in the crucible of extensive usage. The lack of precise or concentrated thinking about the border tax problem is illustrated by the absence of explicit definitions of key concepts.[3]

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[2] 49 Stat. 3960 (1936). Effective May 14, 1936.

[3] For example, the meaning of the phrase linking the import charge at the border with "charge . . . applied, directly, or indirectly, to like domestic products" was not given.

In view of the symmetry implied in border tax adjustments, an interesting historical note is that the provisions on the compensatory tax on imports and the relief of indirect taxes on exports developed quite separately. The GATT rules concerning these two elements of border tax adjustments are found in several articles of the General Agreement and in related interpretative notes and Working Party reports. The basis for the application of compensatory taxes on imports is found in Articles III:2 and II:2(a), which deal primarily with the relationship between internal taxation and imports. The provision with respect to exports is found in Article XVI, which deals with subsidies. This is hardly the handiwork of a drafter intent upon transcribing the destination principle of taxation into a permanent international agreement.

Import Tax Burdens

Article III:2 limits the imposition of internal charges on imported goods to the amount of those charges applied directly or indirectly to like domestic products. By reference to Article III:1, provision is made that such charges on imports shall not be applied "so as to afford protection to domestic production." Article II:2(a) explicitly provides that a limitation on increasing the tariff on goods bound through international agreement does not prevent the imposition or increase of compensatory border taxes.

Export Tax Relief

The 1946-47 version of Article XVI contained only a notification and consultation procedure in cases where the trade effects of subsidies are considered to be serious. It did not define subsidies or how to limit them.

It was not until the GATT Contracting Parties reviewed the various articles of the General Agreement in 1954-55 that a partially successful effort was made to answer these

two questions. In reaching partial agreement, a rule with respect to export tax relief was made by the following interpretative note:

> The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be claimed to be a subsidy.

While the focus of this change limited the definition of an export subsidy there was, however, no elimination of subsidies.[4] Instead it was agreed that there would be no introduction of new, nor extension of existing, subsidies on manufactured goods.

The long negotiation to find language to limit the use under GATT of export subsidies achieved a breakthrough in 1960 when the United States and the other industrialized countries in GATT agreed in a Declaration to cease granting export subsidies on manufactured products.[5] The Work-

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[4] Although no attempt was made to define what was meant by duties or taxes borne by the like product, examination of the discussion at the Review Session related to Article VII (dealing with customs valuation) provides some clarification. During these discussions it was agreed that the note to Article XVI would permit the exemption from, or remission of: "Only (i) internal taxes of the kind which are levied directly on the goods exported (or directly on the materials going into the manufacture of such goods), as distinct from (ii) other taxes (income tax, etc.)".

Although this provides some guidance on the question of direct and indirect taxes, it does not indicate the status of "hidden taxes" (i.e., those not imposed on the exported product itself or on the materials incorporated in the product).

[5] The 1960 GATT Working Party on Subsidies Report stated that the governments prepared to accept this Declaration agreed that, for the purpose of the Declaration a list of certain enumerated practices "generally are to be considered as subsidies in the sense of Article XVI: 4." This Report, which contained the direct/indirect

ing Party report, which constituted the basis for the Declaration, contained a list of measures considered as forms of export subsidies. By indirection, this extended the interpretative note to Article XVI by excluding from the definition of an export subsidy the rebating or exemption of multi-stage indirect taxes. Clearly, the implications of this Declaration were not adequately considered by the United States. Part of the reason was, perhaps, due to political considerations: the United States did not want to appear to be raising obstacles to the tax harmonization objectives of the European Common Market. Nevertheless, there must have been some concern with the interpretation of this article because a special provision for review of the operation of the provisions of Article XVI were inserted at the review session. The drafters did not seem content to rely on Article XXX which provides for the review and amendment of all of the GATT articles.

Conclusions on History

This brief review of the GATT articles demonstrates that there is no consistent rationale behind the GATT rules on border tax adjustments, nor clear-cut guidance on the meaning of the GATT provisions. Articles II and III were incorporated almost in their entirety from existing practices, probably modeled after a U.S.-Canadian commercial

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tax dichotomy in the list of practices, was adopted by the Contracting Parties, the most important representative body within the GATT organizational structure. However, the Contracting Parties provide for a review of the provisions of Article XVI. Paragraph 5 of Article XVI states: "The Contracting Parties shall review the operation of the provisions of this Article from time to time with a view of examining its effectiveness, in the light of actual experience, in promoting the objectives of this Agreement and avoiding subsidization seriously prejudicial to the trade or interest of Contracting Parties."

treaty.[a] The separate treatment of the import duties and the history of clarifying the status of export remissions confirms that no consistent consideration was given to this subject; certainly no specific economic theory was used as the underpinning for the treatment of border tax adjustments. Instead, it would appear that the matter of "border tax rules" was not even a contentious issue. Rather, these rules simply codified certain practices.

It is not surprising that the drafters of the GATT were willing to accept the *status quo*. Problems quite apart from the question of border tax adjustments demanded the attention of the drafters. In a postwar, exchange-control world, where fixed exchange rates were at best approximations of reality, concern voiced about the discrimination that would arise if the world shifted to a buyer's market would probably have been met by some retort such as "we'll worry about that problem if and when it ever arises". Little wonder! In the late 1940's and early 1950's, border tax rates were low—in the range of 2% to 4%—and limited to around one-sixth of the goods traded—and then only in the case of a few nations. Furthermore, a seller's market existed in which demand was highly unresponsive to small price variations. Finally, the $10 billion commercial trade surplus of the United States in 1947 must have had an effect on the attitude of the United States' negotiators. This is best illustrated by the then-prevalent and understandable United States' policy of deliberately encouraging a transfer of financial assets to Western Europe in order to facilitate European reconstruction.

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[a] During the 1930's, when this treaty was written, exchange rates fluctuated. There was probably little concern about the price effect of the import adjustment as such effects would be absorbed by exchange rate changes.

1953 OEEC Review

As early as 1953 there began to be some recognition of the fact that border tax adjustments could create advantages for nations using them. The likelihood of this occurring tended to grow as other barriers to trade fell, and the adjustments were substantially increased. This recognition came in the Working Party on Artificial Aids to Exporters, part of the OEEC Steering Board for Trade. This Working Party discussed the posible trade-diversionary effect of the introduction of the French value-added tax. Some opposing views existed and one of the participants (and then committee chairman) offered a proposal designed to limit the distortion to trade from full tax remissions. The proposal was an attempt to reach a compromise between divergent views and to prevent a disastrous race between OEEC countries in the area of fiscal incentives. The basic provisions of the proposal were:

(1) full relief of exported goods from a single-stage indirect tax would be permitted;

(2) a *limitation* would be placed on the total amount of relief exported goods could obtain from *other forms of indirect taxes and from direct taxes.* The limit would be set as a percentage of the value of the goods at the point of export;

(3) a transition period would be established in order to permit nations to reach the common limit; and

(4) a consultation procedure would be established.

It is interesting to note that this proposal explicitly recognizes a divergence of views concerning: (a) the effects of remissions of direct and indirect taxes; (b) the difference between single-stage and multi-stage indirect taxes; and (c) the need for some limitation to these adjustments. The suggested solution presented a pragmatic and arbitrary solution to a difficult theoretical and political problem. Unfortunately, there was not enough awareness of the significance of the proposal, and the other members of the Working Party were unwilling to moderate their positions.

OECD Border Tax Consultations

In 1963, United States' concern about the trade effects of border taxes was further aroused by the decision of the member states of the EEC to harmonize their tax systems, by adopting the value-added tax (TVA). The United States' government requested the OECD to undertake a careful and comprehensive study of border tax adjustments. In making the proposal, the United States stated: "A study of this subject is particularly timely at the present moment. A number of countries which impose turnover tax adjustments at the border are contemplating changes in the level of such compensatory adjustments, others are considering a change in the method of applying the tax (e.g., a change from the cascade to a value-added type) and some countries which heretofore have not employed a general sales tax by the central government are considering introducing it . . ."

In order to create a better atmosphere in which to review border tax adjustments, the United States sought agreement in the OECD for a *standstill* (i.e., a temporary agreement not to make border tax changes). The Common Market countries opposed the idea, arguing that agreement on a standstill would interfere with their objective of attaining a harmonized tax system by 1970. They were, nevertheless, prepared to agree to a notification procedure which would keep the OECD countries informed about actual and contemplated changes in border tax adjustments. They also were prepared to agree to consultation in the OECD on these changes. This notification procedure was adopted as a second-best solution.

In 1967, at the request of the United States, an *ad hoc* group of the OECD undertook a consultation with Ger-

many on the general trade and payments effects of the German government's announced switch to a value-added tax system scheduled for January 1, 1968. A series of carefully prepared meetings followed. The discussions in this OECD group revealed a considerable difference of opinion on the effects on trade of border tax adjustments. The German delegation not only argued that the TVA was perfectly trade neutral but also that the shift from the then existing cascade-type indirect tax to a TVA system would not appreciably improve Germany's competitive position. This contention was supported by Germany's European Economic Community partners. This is curious, because during this same period three of these countries—France, Belgium, and the Netherlands—were simultaneously moving to increase the level of their own border tax adjustments *for the publicly acknowledged purpose of combating the impact on their trade of the German changeover.*[7] Ironically, the notification procedure worked best for those countries which felt no necessity for it.

[7] See for example, (a) French Finance Minister Debre's speech to the OECD Ministerial Meeting, November 30, 1967; (b) Dutch Finance Minister DeBlock, Memorandum to the Dutch Parliament, October 4, 1967; and (c) Belgian Cabinet Communiqué following their meeting at Knakke. To illustrate the nature of these comments, the following is an excerpt from DeBlock's statement:

> "They (ed.: the government) feel, however, that Dutch industries are right in fearing that they will be adversely affected as a consequence of such a change (ed: adoption of German TVA) in the situation in Germany. . . . there is sufficient reason to take legislative measures ensuring that the international competitive position of Dutch industry does not deteriorate too much."

These related actions demonstrate the tendency towards proliferation inherent in the present GATT rules. The absence of a limitation invites other countries to take similar action. In a recent official paper, the German government has in fact admitted that the changeover to the value-added tax had a substantial effect on export prices.

> ". . . in contrast to earlier Government expectations, the changeover to the value-added tax system after all turned out to favor exports from the point of view of prices. At any rate, average export prices declined by 2.2 percent from January to September."

This explicit and public recognition by Common Market governments of the trade effects of the German changeover of their indirect tax systems destroyed the German contention that the shift was of no significance to international trade.

Testimony of European businessmen further demonstrated the true picture. The Business and Advisory Committee (BIAC) to the OECD gave practical evidence of the serious limitations of the theory underlying border tax adjustments.[8] Briefly, the essence of their views was that "in a strongly competitive situation the prices obtainable—and hence the degrees of tax shifting—are substantially determined by the market itself." If this report is correctly interpreted, they hold that there are a great variety and interdependence of factors which influence tax shifting, but primary importance is attached to the market situation. Of course, if economic conditions are buoyant, there may be a greater possibility of tax shifting than in a depressed and declining economy, just as there is a greater possibility of increasing profits. It seems to me that even though it is extremely difficult, if not impossible, to measure the degree of tax shifting, it is grossly inequitable to maintain, as the GATT rules do, that indirect taxes are *always* fully shifted forward into product prices. By the same token, it is wrong to hold that no direct taxes are ever shifted—forward—to any degree. Perhaps most significant, and for the economist most difficult to measure, is the fact that today we have much more of a buyer's market than existed during World War II and immediately thereafter when the GATT rules

Ministry of Economics, *"The Necessity for Protection Against External Economic Influences"* Section 1, informal translation by U.S. Embassy, Bonn, Germany, November 29, 1968.

[8] Unpublished report dated June 1967.

were drafted. Not only is there increased competition among firms, but the freer trading world fostered by GATT advances substantially the size and number of competitors. Moreover, the development of competitive products (for example, steel and aluminum) expands the range of competition.

Mounting Concern in the U.S.

In the United States, concern about the adverse trade effects of border tax adjustments has been mounting steadily, not only in the Executive Branch of the government but in industry and the Congress as well.

Individual companies have spent considerable time and effort analyzing the effect of changes in border tax adjustments on their exports. Industry associations, such as the Manufacturing Chemists Association (MCA) and the National Association of Manufacturers (NAM), to name but two, also have taken a hard look at the problem.[9] The key Congressional committees concerned with this problem have looked into this subject. In statements recently submitted to the House Ways and Means Committee the two trade associations mentioned above pointed to the increasing awareness that United States exporters clearly face a competitive disadvantage arising from the GATT rules on border tax adjustments.[10] In another indication of concern, the Action Committee on Taxation of the National Export Expansion Council, early in 1966, expressed the view that the GATT rules on border taxes "are discriminatory against the United States"[11] and specifically called for a renegotiation of GATT.

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[9] *The Logic of the Border Tax Mechanism*, Government Finance Division, National Association of Manufacturers, October 1965.

[10] Hearings before the Committee on Ways and Means, House of Representatives, 90th Congress, Part 10, p. 4489.

[11] *Taxation and Exports*, Action Committee of the NEEC, February 1966, p. 17.

As for America's position at intergovernmental meetings, the United States' representative to the OECD consultations on Germany repeatedly voiced concern about the trade effects of the changeovers in indirect tax systems occasioned by the European Economic Community tax harmonization. He pointed out that increases in border tax adjustments would compound the trade advantages gained by the indirect-tax countries. Moreover, he said, for a country with a large balance of payments surplus to undertake a changeover at that time was directly contrary to its responsibility to the better working of the process by which international balance of payments adjustment is achieved. The August, 1966 report of Working Party Three of the Economic Policy Committee of the OECD recognized the responsibility of balance of payments surplus countries, and on this particular issue it said:

> It was noted that on occasions when the national structure or level of indirect taxation was being reformed, the accompanying change in export rebates or import levies or other adjustments can have an impact on international trade, and that further consideration might be given to the question whether countries could undertake to take account of their prevailing balance of payments situation in deciding on the timing of such changes in "border tax" adjustments.[12]

Germany's January 1, 1968 changeover from a cascade type turnover tax with a rate averaging 4% on each turnover to a value-added tax of 10% on most commodities perhaps did more than any other single act to solidify a United States' government attitude that more equity must be

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[12] Organization for Economic Cooperation and Development, *The Balance of Payments Adjustment Process*, A Report by Working Party 3 of the Economic Policy Committee, (Paris: OECD, 1966), pp. 23-24.

achieved in the GATT rules as they pertain to border taxes.[13]

Therefore, the United States pursued the issue in the GATT forum itself. Ambassador Roth, the President's Special Trade Representative, called attention to our serious concern over non-tariff barriers in his statement at the GATT Ministerial Meeting on November 23. These measures adversely affected our trade, and he asked GATT to press ahead and organize itself for a timely resolution of this problem. This initiative resulted in the GATT Ministerial Meeting agreeing to the formation of groups to deal with non-tariff barriers, border taxes, and subsidies and countervailing duties. It was believed that with these groups working concurrently, each at a pace suited to its own purpose, a framework conducive to achievement would be established.

On January 1, 1968, President Johnson called attention to the disadvantage to United States' trade posed by the provisions of the GATT rules on border tax levies and rebates and called for adjustment of these rules. In March of 1968, the United States reviewed the problem with the GATT Council and established the terms of reference for a Working Party to examine the problem of border tax adjustments. On April 30, this Working Party began discussions. It is now under way in its task.

GATT Negotiations

At the initial meeting of the Working Party, April 30—May 2, the United States raised three general problems which we believed should be corrected. First, the GATT border tax rules are inequitable. We questioned whether there should be any border adjustments to compensate for

[13] See U.S. Treasury Department, "Maintaining the Strength of the United States Dollar in A Strong Free World Economy" (Washington: Government Printing Office, 1968) p. 74.

differences in taxation. If there must be border adjustments, then they should be designed to equate the price effect of all taxes—direct as well as indirect. The current GATT rules on border tax practices, limiting adjustment to indirect taxes, (and then 100%) do not reflect adequately this principle.

The second general problem concerns the trade diversionary effect of changes in border adjustments; in addition, it is concerned with the relationship of the timing of such changes to the balance of payments adjustment process.

The third area of concern is the ambiguity in the present rules which allows protective national practices to be justified by interpretations that are at times self-serving. This ambiguity illustrates the need for more precise definitions and a code of practices.

Elaborating on the first general problem associated with GATT, the present border adjustment rules apply the origin principle to direct taxes and the destination principle to indirect taxes.[14] Under the destination principle products are taxed at the point of consumption. Since exported products are consumed abroad they should not pay the indirect tax that would pertain if the goods were consumed at home. Therefore, exports are relieved of the indirect tax burden. Imported goods, on the other hand, according to the destination principle, should carry the same indirect tax burden to avoid a "privileged position" over goods produced domestically. Accordingly, tax frontiers are established at the border. On the other hand, it is argued that regardless of the rate of direct taxes, the sales prices of the products are unaffected. Consequently, border adjustments would not be

[14] For a brief discussion of the destination and origin principles, see Carl S. Shoup, "Indirect and Direct Taxes and Their Influence on International Trade," a paper submitted to the House Ways and Means Committee, June 1964.

justified, even if the destination principle were employed for direct taxes, because the direct tax is presumably not passed on to the point of consumption.

In contrast, the origin principle states that goods should be taxed at the point of production; thus, border adjustments are not permitted. It is the origin principle toward which the Common Market is moving for transactions between member states. Interestingly, the Common Market decision to harmonize tax systems and eventually to adopt a common tax system was based on the desire to eliminate tax frontiers. The argument was advanced that such frontiers constitute both a psychological and a real obstacle to a truly free exchange of goods and services.

The origin principle must not be overlooked in seeking a solution to the border tax problem. Adjusting for indirect taxes means that one aspect of government policy is singled out for special treatment. There are no adjustments for a wide range of other government measures which directly affect prices. Nor are there adjustments for many forms of taxation which affect prices. Frequently, government economic policies affect private industry and trade but they are not necessarily accompanied by offsetting action. Moreover, many of the governmental services financed by indirect taxes may be provided through the private sector in other countries. To this extent, the border tax adjustment rules have an influence on the distribution of activities between the government and the private sector. This is a wholly inappropriate by-product of the GATT rules. Only in the case of indirect taxes is there an institutionalized provision for offset.

Modern economic theory suggests that the distinction implicit in the GATT treatment of direct and indirect taxes is an extreme and arbitrary assumption which does not

stand the test of economic reality.[15] While economists and businessmen may disagree on the extent of the forward shifting of indirect and direct taxes, they do agree that the extreme assumptions which are necessary to make the present GATT rules trade neutral are an inadequate approximation of reality. Therefore, a border adjustment equivalent to the full internal indirect tax tends to stimulate exports and provide protection against imports.[16] In brief, the present provisions of GATT divert trade and thereby disadvantage countries such as the United States and Canada which rely primarily on direct taxes.

Not only are the GATT rules unfair, they are illogical and unreasonable. There is a contradiction between the way in which direct taxes are treated in the provisions relating to subsidies and in the provisions relating to border tax adjustments on the import side. If the remission of direct taxes is considered a subsidy, this is presumably because it is felt that this would have an effect on the price of the exported products. But if direct taxes had an effect on price, it could be argued that adjustments should be made in respect to them at the border. Furthermore, there should be no presumptions about the administration of direct tax remissions being more difficult than indirect tax remissions and thus no additional concern about the price effects of the former due to administrative problems.

The second general problem concerns changes by a nation in its border tax adjustment practices. There are three categories of changes. (1) When the level of the indirect tax within the country and at the border is changed by the

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[15] The material on shifting of general taxes has become quite extensive. For a review of the debate, see John F. Due, "Sales Taxation and the Consumer", *American Economic Review* (December 1963) pp. 1073-84.

[16] Stanley S. Surrey, "Implications of Tax Harmonization in the European Common Market", a speech before the National Industrial Conference Board, New York (February 1968).

same amount. Germany's 1% increase on July 1 is a case in point. (2) When the amount of adjustment at the border is different from the domestic level of the tax and this difference is "corrected". (A level of adjustment lower than the tax is "under compensation"; a higher level of adjustment is "over compensation".) Belgium's increase in border adjustments in 1967 and 1968 are examples of a country moving from "under compensation" to "full compensation". The German border tax change in November 1968 is an example of a move from "full compensation" to "under compensation". It is argued that the German change on January 1, 1968 included a few cases of "over compensation" going to "full compensation". (3) The third involves the changeover resulting from the adoption of a new type of indirect tax. Germany did this on January 1, 1968 and the Netherlands will do it a year later.

Within the three categories mentioned, changing the degree of adjustment at the border without commensurate changes in the relevant indirect tax brings about the most striking effects on trade. Other changes are considerably more difficult to measure—but frequently no less significant in their impact upon trade.

The increasing use of border adjustments suggests, however, that governments actually believe there are trade effects. In any case, changes in border tax adjustments to eliminate "under compensation" clearly have favourable trade effects on the country making the change. The increase in the export rebate and import surcharge can be looked at as having exactly the same effect as a devaluation on the trade account—it improves the competitive position of the country making the change and thereby strengthens their trade account. Such actions by a trade surplus country exacerbate the problems of countries working towards balance of payments equilibrium and are directly counter to the surplus countries' responsibilities to assist the international adjustment process.

The third general problem with the GATT border tax adjustment rules concerns the extent to which the lack of trade neutrality is aggravated by techniques used in the administration of border tax adjustments—for example, (a) the necessity of using averaging techniques to determine the amount of adjustments, as is the case in any cascade system [17]; (b) by the inclusion of secondary indirect taxes (*taxes occultes*) which are not "borne by the produce", in border adjustments; and (c) the arbitrary assumption of tax and subsidy allocation on grain sales within the European Economic Community on agricultural products. These technical determinations are left open to national judgment because of the lack of precision in the GATT rules and by the complexity of the issues. Assumptions employed by fiscal and trade technicians are not likely to err on the side of trade neutrality.

Due to the complexity of manufacturing processes, the difficulty of cost accounting and the varying tax systems of the countries making border adjustments, it is impossible to determine accurately the indirect tax actually borne by domestic goods. The "real number" is a changing number in any event—by product and in response to market factors. This is likely to be more true of a multi-stage turnover tax than a single stage retail tax. As products undergo varying stages of production, the tax burden will vary between commodities. In order to avoid the task of ascertaining the tax burden on each commodity, averages are used to determine a mean rate for a commodity class and the appropriate border adjustment. By their very nature, averages result in trade distortion as some commodities receive adjustments in excess of the domestic tax burden while other commodities are "under compensated".

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[17] In a cascade system, the tax burden on a product depends in part on the number of transactions it undergoes. As this will vary from product to product, and even for different units of the same product, there is no single estimate of burden which can be universally applied. Therefore averages are used.

The GATT rules permit adjustment for taxes levied on or borne by goods. Although there is not much confusion about the fact that GATT, as currently drafted, classifies corporate income taxes as direct, there is controversy about the status of other taxes. Many countries adjust for taxes on such items as gasoline, general overhead expenses, capital, etc., taxes which are difficult to consider as levied on a specific product. We believe the arbitrary adjustment for such taxes, often referred to as *taxes occultes,* is contrary to the GATT rules and trade diversionary in effect.

The combination of erroneous shifting assumptions, *taxes occultes,* averaging and changes in border tax adjustments combine to make the present GATT rules far from trade neutral; in fact, they are damaging to your trade and ours.[18]

The obvious next question is, what alternatives exist which are more neutral and less discriminatory?

Approaches to Solutions

One approach that has been suggested is that the U.S. not seek a change in the GATT rules but, instead, adopt its own federal indirect tax system.

Here, I concur with Mr. Latimer's statement in his article in the *Canadian Tax Journal* which I referred to at the outset of my remarks. He said:

> The essence of the (border tax) debate is that countries should be at liberty to choose the structure and level of taxation consistent with their notions of economic growth and tax equity, without at the same time prejudicing their international trading position.[19]

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[18] For a theoretical discussion of the trade effects of border taxes, see Richard Musgrave and Peggy Richman, "Allocation Aspects, Domestic and International", in John Due, editor, *The Role, of Direct and Indirect Taxes in the Federal Revenue System* (Princeton: Princeton University Press, 1964).

[19] *Op. cit.*, p. 409.

As a second approach, there have been some who argue that the U.S. should disregard GATT and make similar border adjustments, with or without reference to our direct taxes. GATT is too vital a multilateral institution for such a course of action to recommend itself.

A third approach involves multilateral negotiations to reduce the inequities in the present rules, while harmonizing international tax practices as they pertain to trade between nations. In the last analysis, what is needed is a sane, simple and practical way to resolve this problem. A workable set of rules can be devised and these rules could promote the objectives of GATT. Such an approach would be in the greater interests of the whole trading community in serving to avoid practices prejudicial to the trade of any contracting party.

Within this framework, the use of the origin principle in trading has definite attraction. It would eliminate an unnecessary barrier to trade, remove a discriminatory feature of the rules governing trade, and provide a consistent treatment for the trade effects of government tax and economic policy. Whatever its attractions—and I think they are many—the origin principle poses serious problems. The most prominent of these is how to implement the principle in the fixed exchange rate system we now have.

Other approaches, of course, could be based on the destination principle. However, under the present rules we have seen broadly increased uses of border tax adjustments resulting from changeovers in tax systems. The present rules have encouraged the adoption by other countries of indirect taxes permitting border tax adjustments. The proliferation of "adjustable" indirect tax changes is startling, and in trade terms frightening. Moreover, present rules provide no limit whatsoever to the degree of "adjustment" permitted for indirect taxes. If allowed to continue unrestrained, this proliferation will work to undo much of the progress towards freer international movement of goods, services and capital.

In conclusion, the GATT rules must be improved in such a way that they do not permit nations to achieve a trade benefit through the adoption of one domestic tax system over another. A pragmatic and equitable solution must emerge from the GATT negotiations now in progress. Our trading partners did not agree to a "standstill" on new border tax adjustments while the existing rules were under discussion. The result has been that adjustments have continued to mount, rewarding protectionist sponsors and arousing the envy of others who might be tempted to take similar trade restrictive actions. There is no longer time for drawn-out deliberations. The proliferation of changes and new border taxes gives great urgency to the GATT work.

UNITED STATES CUSTOMS COURT

[Exhibit 7 to Plaintiff's Reply to Defendant's Supplemental Memorandum]

April 3, 1970

The Honorable Myles J. Ambrose
Commissioner of Customs
Bureau of Customs
2100 K Street, N.W.
Washington, D.C. 20226

PETITION FOR THE LEVY OF COUNTERVAILING DUTIES

Dear Sir:

Petitioner, Zenith Radio Corporation, having good and sufficient reason to believe that bounties and grants are being paid or bestowed, directly or indirectly, upon the manufacture, production and export of dutiable merchandise, listed on the attached Exhibit A, continuously being imported into the United States in vast quantities from Japan hereby respectfully requests that the Secretary of the Treasury investigate, ascertain and determine or estimate the net amounts of each such bounty and grant and levy appropriate countervailing duties in accordance with the mandate of Section 303, Tariff Act of 1930 (19 U.S.C. 1303).

STATEMENT OF REASONS FOR PETITIONER'S BELIEF AS REQUIRED BY 19 CFR 16.24(b)

Attached hereto as Exhibit B is a copy of a Department of State memorandum under date of November 6, 1968, on the subject of "Japan's Export Promotion Techniques" briefly detailing some of the various bounties and grants which, it is submitted, are clearly encompassed by Section 303, Tariff Act of 1930.

SUMMARY OF KNOWN TAX INCENTIVES FOR EXPORTING

The following tax incentives, described briefly in Exhibit B, are currently in effect and should be countervailed as required by the countervailing duty statute.

1. *Special Depreciation Allowances*

Article 46-(2) of the Japanese Special Taxation Measures Law Relating to Exceptions to the Corporation Tax Law (1969-1970) provides that firms manufacturing and producing for export may take depreciation at a rate in excess of the regular rates for plant and equipment set out in the statutory tax rules. This measure insures a greater internal cash flow and in conjunction with the Reserve for Export Market Development described in paragraph 2 below effects very substantial tax savings as an incentive for exporters.

Pursuant to Article 46-(2), items 1 and 2 of the Special Taxation Measures Law, as of April 1, 1968, the accelerated depreciation system was geared up to permit major exporters to apply a multiplier to their export ratios. In order to participate, firms are classified as either "B" exporters or "A" exporters. To qualify as a "B" exporter, a company is required to increase the value of its exports by 1% or more over two successive accounting periods (i.e. in one six month period compared to the previous one). To qualify as an "A" exporter, a company must meet this same goal, but without its export ratio falling. Alternatively, it must show a growth in its exports equal to at least 66% of the total increase in Japan's exports in the period concerned.

2. *"The Overseas Market Cultivation Reserve."*

Article 54 of the Special Taxation Measures Law provides an advantage accompanying the provision in paragraph 1 above that permits both manufacturers and exporters to set aside a part of their gross export proceeds as reserves to develop overseas markets. The normal percentage of gross export proceeds is 0.5% for major trading companies, 1% for those with less capitalization and 1.5% for manufacturers.

The 0.5% of gross earnings that a major trading company can put into its foreign market development reserve becomes 0.65% if it qualifies as a "B" exporter and 0.8% if it qualifies as an "A" exporter. For smaller trading companies that qualify as "B" exporters, the rate becomes 1.3% and for those qualifying as "A" exporters, the rate is 1.60%. For manufacturers, the rates are multiplied to 1.95% and 2.4% respectively. These reserves are deducted from net taxable income after all business expenses. When merchandise passes from the manufacturer to an exporter, both are permitted to set up reserves based upon the same transactions.

The very favorable results produced for exporters by these incentives and subsidies are illustrated by the following example from page 6 of the State Department's memorandum, Exhibit B, attached:

In the example given, Company "Y" is a Japanese manufacturer selling only in the home market and Company "X" qualifies as an "A" exporter. The system works as follows:

	"Y"		"X"	
Gross Sales Revenue		100		100
Costs				
Material, labor, etc.	70		70	
Depreciation	10	80	19.6*	89.6
Gross profit		20		10.4
Reserve for o/seas market devel.		—		2.4**
Adjusted gross profit		20		8.0
Tax at 50%		10		4.0
Tax saving		—		6.0

* As explained above, company X gets 96% acceleration of depreciation.

** As an "A" exporter, company X can set up a reserve equal to 2.4% of gross export proceeds.

3. *Overseas Investment Loss Reserve*

To stimulate exports, Article 56 of the Special Taxation Measures Law permits Japanese firms to accumulate a fund equal to 50% of its investments abroad as a reserve against losses. As stated in the State Department memorandum, Exhibits B, at page 7, paragraph (D):

> "Because the GOJ must approve and license such investments, this incentive is allowed only when Japanese exports will be stimulated or other favorable balance of payments will be achieved."

4. *"Exceptional Rules of Taxation Respecting Overseas Transactions in Technology."*

Article 58 of the Special Taxation Measures Law provides for special deductions from taxable income for Japanese firms which have earned foreign currencies through the export of technical services, patent rights, copyrights, etc. The utilization of this law in connection with the exportation to the United States of the dutiable merchandise which is the subject of this complaint should be investigated.

5. *"Entertainment Expenses."*

Article 38, items (1) and (2) of the Special Taxation Measures Law provides preferential tax treatment of "expenses" incurred overseas in "entertaining" foreign buyers.

The use of this broad incentive in the sale and exportation to United States buyers of the subject merchandise should be investigated.

6. *Tariff Rebate to Exporters*

The customs drawback system, as indicated in paragraph (G), page 8 of the State Department memorandum, Exhibit B, is administered with respect to items selected on the basis of "what practical value their export would have

for Japan." It is submitted that this familiar area for concealed bounties and the use of the formula referred to in the State Department memorandum should be investigated.

Financial Incentives[*]

7. Japanese firms by virtue of an elaborate system of governmental financial bounties and incentives, as described in the footnote references, are able to operate on a vast scale with very high debt: equity ratios far beyond that possible in the United States or other countries. The debt component is frequently four or five times the equity. (See the analysis by James C. Abegglen in the March, 1970 edition of *Scientific American* at pages 31-37, attached hereto as Exhibit D.)

Against this background, the spread between the discount rate on export trade bills and that on commercial paper provides a strong incentive to export.

The export advance bill system together with the policy and practices of the Japan Export-Import Bank and the related financial incentives and subsidies described in Section II of the State Department memorandum are powerful subsidies clearly encompassed by our countervailing duty statute.

Export Insurance System

8. The Ministry of International Trade and Industry has described this phase of the Japanese export bounty system in a memorandum entitled "A Brief Introduction to the Export Insurance" dated November, 1966, and attached hereto as Exhibit E. The system is also described in Section III of the State Department memorandum, Exhibit B.

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[*] A copy of a section of the Japan Foreign Trade News describing these incentives in general is attached hereto as Exhibit C. The State Department memorandum, Exhibit B, also describes these incentives in some detail at pages 8-11.

The purpose and effectiveness of this government subsidy is described by MITI itself at page one of its memorandum as follows:

> "The Government of Japan underwrites, by itself, export insurance policies to insure perils and risks which are brought about by export transactions or other overseas transactions conducted by traders and manufactures [*sic*] who are engaged in pursuit of foreign trade and production of goods for export and which are not insurable through the existent private insurance institution at present. Export insurance thus aims at protecting those concerns who are engaged in foreign trade activities and enabling them to undertake their activities without fear to bear loss by themselves.
>
> • • •
>
> "This brief pamphlet aims at sketching the whole picture of the government export insurance system which plays a useful and constructive role in export selling of international trade."

Japan External Trade Organization

9. Another most effective export subsidy is provided by the highly organized government owned corporation known as JETRO (Japanese External Trade Organization). The extremely valuable marketing research, promotion, design, advertising and other services provided by this organization are briefly described in Section IV of the State Department memorandum, Exhibit B.

Tax Credits for Research

10. Incentives in the form of tax credits for research, a function essential to the business of every exporting manufacturer of the products referred to herein, are also a part of the Japanese bounty program. Effective for accounting periods beginning on or after June 1, 1967, a corporation

increasing its expenditures for research and experimental projects as compared to the immediately preceeding [*sic*] period is allowed a tax credit in an amount equal to 25% of the incremental change up to 10% of the corporation tax due.

The Commodity Tax Law Exemption for Export

11. So called "indirect taxes" provide over forty percent of total national revenues in Japan—approximately three times the ratio of "indirect taxes" to total national revenues in the United States. A principal source of these taxes in Japan is provided by the Commodity Tax Law. Under this statute, with certain exceptions made from time to time, Japanese manufacturers are taxed on the manufacture and sale of the subject products at varying rates from 5% to 20%.

As an important part of the overall Japanese system designed to induce exportation by providing incentives therefor, as well as to subsidize exports and conceal dumping of consumer electronic products, Japan exempts from such taxes all exports of the subject merchandise. The exemption from these taxes provides an effective subsidy by excusing such exports from their proper share of the overall general tax burden.

The "plain, explicit, and unequivocal purposes" of our countervailing duty statute was set forth in *Nicholas & Co. v. United States*, 7 Ct. Cust. Appls., 97, 106, T.D. 36426 (1916), affirmed (1919) 249 U.S. 34, as follows:

> "• • • Whenever a foreign power or dependency or any political subdivision of a government shall give any aid or advantage to exporters of goods imported into this country therefrom whereby they may be sold for less in competition with our domestic goods, to that extent by this paragraph the duties fixed in the schedule of the act are increased. It was a *result* Congress was seeking to equalize regardless of whatever name or in whatever manner or form or for whatever

purposes it was done. The statute interprets itself as a member of an act calculated to maintain an accorded protection, incidental or otherwise, as against payments or grants of any kind by foreign powers, *resulting* in an equalization thereof to any extent directly or indirectly. • • •

• • •

"• • • The sole inquiry is, do the results of such acts stimulate exportation or give a special advantage by affording aid from the public treasury whereby such goods may when exported be sold in competition with ours for less. • • •"

As the Supreme Court unequivocally stated in *Downs* v. *United States*, (1903) 187 U.S. at pages 513, 515:

"• • • if a preference be given to merchandise exported over that sold in the home market, by the remission of an excise tax, the effect would be the same as if all such merchandise were taxed, and a drawback repaid to the manufacturer upon so much as he exported. • • •

• • •

"The details of this elaborate procedure for the production, sale, taxation, and exportation of Russian sugar are of much less importance than the two facts which appear clearly through this maze of regulations, *viz.*: that no sugar is permitted to be sold in Russia that does not pay an excise tax of R. 1.75 per pood, and that sugar exported pays no tax at all. . . When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name, it is disguised, it is a bounty upon exportation."

In the Nicholas case the Supreme Court quoting from *United States* v. *Passavant*, (1898) 169 U.S. 16, explained the equitable basis and need for countervailing duties in such tax remissions for exports as are involved here:

"• • • We . . . said, through Mr. Chief Justice Fuller, that 'the laws of this country in the assessment of duties proceed upon the market value in the exporting country, and not upon the market value less such remission or amelioration as that country chooses to allow in accordance with its own views of public policy.' And this conclusion was reached upon the effect of the remitted tax, and not upon the word used to designate it. In other words, the decision was not determined by a consideration of costs of manufacture or their reimbursement, nor by the requirements of the policies of the exporting country. It regarded the fact and effect of the remitted excise." (249 U.S. at pages 40-41)

The efforts of the Treasury Department to have Congress amend Section 303 to exclude from its coverage all exemptions of exported articles from taxes imposed on like articles destined for consumption in the country of origin failed. It is submitted that Section 303 as written and as clearly interpreted in relevant rulings in Nicholas and Downs should not be ignored in the circumstances of the instant case. The Japanese commodity tax scheme is an integral part of their extensive bounty and grant program and clearly should be countervailed.

Shipping

An investigation should also be made as to the existence and effect of subsidization in the Japanese shipping industry which may disclose the need for countervailing duties to equalize the following unfair disparity between ocean freight rates applicable to shipments between Japan and the United States:

For the subject merchandise valued over $500 per ton, the rate from Japan to the United States is $40 per 40 cubic feet or per ton whichever is greater, while the freight rate on the same merchandise from the United States to Japan is $70.

Failure to Report Bounties and Grants

There is another aspect of this matter that should be given expeditious attention. Customs form 5515 requires answers to the following question:

> "6. Are any rebates, drawbacks, bounties, or other grants allowed upon the exportation of the goods? [ ] Yes [ ] No. If so, have all been separately itemized? [ ] Yes [ ] No."

On information and belief knowledgable importers of Japanese electronics products have been evading this question despite the sanctions provided in 19 U.S.C. 1592 and 18 U.S.C. 1001.

The Urgency of This Petition

While Section 303 does not require any showing of injury, the urgency of this matter and the need for an expeditious investigation and compliance with the mandate of the statute is apparent from the following facts:

Beginning in the 1950's, the Japanese participation in the United States electronics market has not been in any sense a matter of free trade. It has been a calculated predatory invasion based upon the following factors:

1. An elaborate government subsidy program.
2. Subsidized know-how and patent arrangements with certain experienced American companies.
3. A protected home market, effectively closed to American and other competition, where prices are controlled by trade associations and maintained at artificially high levels.
4. A dumping program eagerly patronized by large American merchandisers.

In the late 1950's, millions of excessively low priced transistor radios were dumped into the United States. By 1960, 55 percent of all portable radios sold in the United States were of Asiatic origin. By 1968, this figure rose to almost 95 percent and by the last quarter of 1969 to approximately 97 percent. For total radios, including portables but excluding automobile radios, imports accounted for approximately 88 percent of the market in 1969 and approximately 90 percent in the fourth quarter of 1969. Except for certain specialty types, the manufacture in the United States of radios was made economically impossible within ten years of this predatory invasion.

Having thus captured virtually the entire radio market and employing the same predatory tactics and aids described above, the Japanese manufacturers began in the 1960's to seize the American television market and make economically impossible the American manufacture of television receivers. From only 2 percent of the United States market in 1962, imported black and white television receivers rose to over 29 percent of the market in 1968 and in the fourth quarter of 1969 accounted for 50 percent of the entire American market. Imported color television which rose to 11 percent of the market in 1968, has risen in 1969 to over an 18 percent share of the market in the fourth quarter of 1969 and has accounted for more than 1 out of every 6 color television receivers sold in the United States. When color and black and white television statistics are combined, imports account for over 35 percent of the total television receiver market for the fourth quarter of 1969. For the same fourth quarter, the market share held by imported phonographs rose to over 34 percent and the share of the market held by imported home magnetic tape recorders rose to approximately 93 percent.

During this period of time many American manufacturers, in order to survive, were forced by this subsidized and predatory Japanese competition first to purchase components from Japanese sources and, when this measure

proved insufficient, to make or procure their radio and television chassis or complete sets in Japan, Hong Kong, and Taiwan. An alarming movement of American plants to Asia has taken place, and Taiwan and Mexico, providing subsidies and incentives as well as cheap labor, have become the new sites of many former American based factories. This trend for survival against unfair subsidized competition by moving American plants abroad is continuing at an alarming rate. It is conservatively estimated that over 45,000 jobs have already been lost to American workers in this industry as it rapidly retreats to foreign manufacturing sites. Many of them are blacks and members of other disadvantaged minorities trained or in the process of being trained for productive employment in this industry pursuant to suggested Government programs.

Petitioner favors and has always favored free and fair international trade. It cannot, however, continue to manufacture its products in this country unless the predatory incursion briefly described herein is stopped by the effective and expeditious enforcement of our relevant laws.

It is respectfully submitted that in the context of this industry crisis this petition for full and expeditious enforcement of Section 303 of the Tariff Act of 1930 should be favorably considered.

Respectfully submitted,

ZENITH RADIO CORPORATION

By /s/ PHILIP J. CURTIS
PHILIP J. CURTIS
Secretary

PJC/nb
Attachments

CONTENTS

Exhibit A.....List of Subject Dutiable Merchandise and Principal Japanese Producers

Exhibit B.....State Department Memorandum

Exhibit C.....Financing of Exports "Japan Foreign Trade News"

Exhibit D.....The Economic Growth of Japan "Scientific American"

Exhibit E.....A Brief Introduction to the Export Insurance

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UNITED STATES COURT OF CUSTOMS
AND PATENT APPEALS

THE UNITED STATES, *Appellant*,

v.

ZENITH RADIO CORPORATION, *Appellee*.

Notice of Appeal

To the Honorable the United States Court of Customs and Patent Appeals:

Your appellant, being dissatisfied with the decision and judgment of the United States Customs Court in each of the matters referred to in the accompanying Schedule A, respectfully prays your Court, pursuant to sections 1541(a) and 2601(a),(b), Title 28, United States Code, to review the questions involved therein and to grant such relief in the premises as to the Court shall seem just. The particulars of the errors of law and fact involved in said decision and judgment with which your appellant is dissatisfied are set forth in the accompanying Assignment of Errors.

Respectfully Submitted,

BARBARA ALLEN BABCOCK
Assistant Attorney General,

By: DAVID M. COHEN
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New York, N.Y. 10007
Attorney for the United States,
Appellant.

Dated: New York, N.Y.

ASSIGNMENT OF ERRORS

The United States Customs Court has erred as follows:

1. In finding and holding that the exemption, under the Commodity Tax [*sic*] of Japan, of television reecivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes from a commodity tax, when exported from Japan, or the refund of such tax upon the exportation from Japan of such electronic products constitutes the payment or bestowal of a net bounty or grant within the embrace of section 303 of the Tariff Act of 1930, as amended, 19 U.S.C. 1303.

2. In not finding and holding that the exemption, under the Commodity Tax [*sic*] of Japan, of the above enumerated electronic products from a commodity tax, when exported from Japan, or the refund of such tax upon exportation from Japan does not constitute the payment or bestowal of a net bounty or grant within the embrace of section 303 of the Tariff Act of 1930, *supra*.

3. In directing the Secretary of the Treasury to order the appropriate customs officers throughout the United States to assess countervailing duties on the above enumerated electronic products exported from Japan, entered or withdrawn from warehouse for consumption on or after the day following the date of entry of the Customs Court's order.

4. In directing the Secretary of the Treasury to act contrary to law.

5. In finding and holding for the appellee (plaintiff below), contrary to law.

SCHEDULE A

Subject: Electronic Products
Decided: April 12, 1977 (C.D. 4691)
Time to Appeal Expires: June 10, 1977
American manufacturer, producer, or wholesaler: Zenith Radio Corporation

[The notice of appeal was served and filed April 15, 1977.]

SUPREME COURT OF THE UNITED STATES

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner*

v.

UNITED STATES

ORDER ALLOWING CERTIORARI. Filed February 21, 1978.

The petition herein for a writ of certiorari to the United States Court of Customs and Patent Appeals is granted.